United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

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P/S

76-4044

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 76-4044

BOC INTERNATIONAL LIMITED, f/k/a The British Oxygen Company Limited, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, and BRITISH OXYGEN INVESTMENTS, LIMITED,

Petitioners,

—against—

FEDERAL TRADE COMMISSION,

Respondent.

No. 76-4045

AIRCO, INC.,

Petitioner,

—against—

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITIONS FOR REVIEW OF AN ORDER
OF THE FEDERAL TRADE COMMISSION

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BOC RX 199	Table of Unit Value—Shipments—Oxygen—1963-1972	A5217
BOC RX 200	Document consulted by Dr. Hedley-Whyte during direct examination	A5218
BOC RX 206	June 1, 1970 Report on visit to Carpenter Technology by Perham and Muller	A5219
BOC RX 208	U.S. Dept. of Commerce, *U.S. Industrial Outlook*, 1974	A5222
BOC RX 222	Sept. 29, 1972, R. C. Hesketh-Jones, Consultation BOC-Overseas Companies	A5224
BOC RX 223	July 21, 1972, R. C. Hesketh-Jones, Overseas Company Boards	A5227

		PAGE
BOC RX 228	Program for the American Society of Anesthesiologists Annual Meeting, Oct.7-11, 1973	A5231
BOC RX 234	May 19, 1970 Letter from D. R. Harris to J. A. Perham	A5249
BOC RX 243	Percent Return on Total Invested Capital	A5250
BOC RX 244	Percent Return on Stockholders' Equity	A5251
BOC RX 246	Graphs of gas volume, quantity and unit price	A5252
BOC RX 260	Perry paper on oxygen and nitrogen (not in evidence)	A5265
BOC RX 261	American Iron & Steel Institute 1973 Report (not in evidence)	A5271

Exhibit Offered by Respondent Airco, Inc.

RAX 7	Airco Annual Report for 1973	A5274

Volume 10—In Camera Filings*

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* The Table of Contents for Volume 10 appears only in that volume.

In the matter of BRITISH OXYGEN COMPANY, LIMITED, et al

No. 8955

COMPLAINTS

DOCKET ENTRIES

RESPONDENTS	Complaint Served	Answer Filed	Initial Decision Served	Commission Decision Served	Compliance Report Filed
The British Oxygen Company Limited 1. ~~British Oxygen Company, Limited~~ Hammersmith House, London W6, England	1-3-74 ?	3-14-74 *5-24-74	11-4-74		
2. BOC Financial Corporation 306 South State Street, Dover, Delaware, 19901	2-28-74	3-14-74 *5-24-74	10-31-74		
BOC Holdings Limited 3. ~~BOC Holdings, Limited~~ Hammersmith House, London W6, England	1-3-74 ?	3-14-74 *5-24-74	11-4-74		
British Oxygen Investments Limited 4. ~~British Oxygen Investments, Limited~~ Hammersmith House, London W6, England	1-3-74 ?	3-14-74 *5-24-74	11-4-74		

(Cont'd on sheet 2)

FOR COURT ATTORNEYS, see Court Sheet
ATTORNEYS

Paul, Weiss, Rifkind, Wharton & Garrison
345 Park Avenue, New York, New York, 10022
(1,2,3,4)

attn: Jay Topkis & Peter Gold

Sherman & Sterling
53 Wall Street, New York, New York, 10005
(5)

attn: George Wade & Bruce McWhorter

Act: F.T.C.
Clayton Act - Section 7

Charge—Commodity—Trade Name:
Restraint of trade - Combination-
Agents - For purpose of - To lessen competition or create a monopoly -
Stocks - Purchase of - To lessen competition or create a monopoly -

Industrial gases
Inhalation anesthetic equipment
Inhalation therapy equipment
Medical pipeline systems

Hearings:

			PAGES
Washington, D.C. -	March 12, 1974	-	1-30
	March 28, 1974	-	31 - 81
	April 17, 1974	-	82 - 128
	April 25, 1974	-	129 - 189
	May 6, 1974	-	190 - 359
	May 7, 1974	-	360 - 507
	May 8, 1974	-	508 - 644
	May 9, 1974	-	645 - 776
	May 10, 1974	-	777 - 851
	May 13, 1974	-	852 - 967
	May 14, 1974	-	968 - 1035
	May 20, 1974	-	1036 - 1185
	May 21, 1974	-	1186 - 1379
	May 22, 1974	-	1380 - 1487
	May 23, 1974	-	1488 - 1506

(cont'd. on sheet 10, 3rd column, reverse side of sheet)

Administrative Law Judge:

Raymond J. Lynch - 2-26-74 to 3-4-74
E. G. Barnes - 3-4-74

Counsel Supporting Complaint:

K.K. Thurman -
J.C. Egan - 3-4-74 to
K.G. Sterling - 3-4-74
G. Youngwood - 3-4-74
D.E. Purcell - 3-4-74
D.A. Nickel - 3-4-74
R.R. Krulle - 3-4-74
J.R. Hoagland - 3-4-74
R.E. Liedquist - 3-24-74

HISTORY

10-18-74	Initial Decision Filed
12-8-75	Final Action: Adopting after modification administrative law judge's initial decision and order to cease and desist, and order to file report of compliance Opinion - Commission - attached (For voting record see history column)

Initial hearing set for:

April 17, 1974
Federal Trade Commission Offices
Room 532 Building, 11th & Pa. Avenue, N.W.
Washington, D.C. 20580

2-26-74	Complaint Issued. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 2-27-74 Sherman & Sterling - 2-27-74
2-26-74	Order by Chief, Administrative Law Judges, appointing Administrative Law Judge R. J. Lynch. (served with complaint)

(con't on reverse side of sheet, col 2)

* Amended Answer

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Docket Entries

COURT PROCEEDINGS

SKELETON

8955 - 1, Pleadings, etc.
8955-1-1 Pleadings, etc.
-1-2 Court Documents
-1-2-1 Court Documents
-1-2-2 Court Documents
-1-2-3 Interlocutory
-1-3 Proposed Findings
-1-3-1 Proposed Findings
-1-3-2 Initial Decision

8955-2 Testimony
8955-2-1 Testimony - 1 - 644
-2-2 - 645 - 1339
-2-3 - 1334-2[illegible]
-2-4 - 2[illegible]

1
8955-1 Exhibits to testimony-Documentary

1-1
8955-1 COMM. EX. 1 thru 11

1-2
8955-1 COMM. EX. 12 thru 39

1-3
8955-1 COMM. EX. 40 thru 67

1-4
8955-1 COMM. EX. 68 thru 125

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8955-1 COMM. EX. 126 thru 173

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8955-1 COMM. EX. 174 thru 225

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8955-1 COMM. EX. 226 thru 334

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8955-1 COMM. EX. 335 thru 342

RESP. EX. 1 thru 32

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8955-1 RESP. EX. 33 thru 56

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8955-1 RESP. EX. 57 thru 97

1-11
8955-1 RESP. EX. 98 thru 208

1-12
8955-1 RESP. EX. 209 thru

1-13
8955-1 [illegible]

2
8955-1 Exhibits to testimony - Physical

2-1
8955-1 Comm. Ex. A.
Book - "Ohio Medical Products"
Seq. 30 - Shelf 1

8340

HISTORY

3-4-74	Order by Chief, Administrative Law Judges, appointing substituting Administrative Law Judge Ernest G. Barnes. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 3-7-74 Sheerman & Sterling - 3-6-74
3-5-74	Request by counsel supporting complaint for a pretrial conference. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 3-7-74 Sheerman & Sterling - 3-7-74
3-6-74	Administrative law Judge's order cancelling initial hearing and scheduling prehearing conference for March 13, 1974, at 11 a.m., Washington, D.C., Room 532, Federal Trade Commission Offices, 6th & Pa. Ave., N.W. Served: Paul, Weiss, Rifkind, Wharton & Garrison - Sheerman & Sterling -
3-12-74	Answer filed by respondent (5).
3-12-74	Application by counsel supporting complaint for issuance of subpoenas duces tocum to [illegible] (* 3) Mailed: Paul, Weiss, Rifkind, Wharton & Garrison Sheerman & Sterling
3-12-74	Proposed pretrial schedule submitted by counsel supporting complaint, with attachment. Mailed: Paul, Weiss, Rifkind, Wharton & Garrison Sheerman & Sterling
3-12-74	Motion by respondents (1 to 4 incl.) for an expedited schedule which will insure that the hearings will begin April 1, 1974 and that the proceedings, including the final decision, will be concluded by July 1, 1974.

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BEST COPY AVAILABLE

HISTORY

3-13-74	Administrative law judge's order scheduling prehearing conference for March 13, 1974, at 11 a.m., Washington, D.C. Rm - 532, Federal Trade Commission Building, 6th & Pennsylvania Avenue, N. W. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 3-18-74 Sheerman & Sterling - 3-15-74
3-14-74	Answer filed by respondents (1 to 4 incl.)
3-15-74	Opposition by counsel supporting complaint to motion by respondents (1 to 4 incl.) for an expedited schedule.
3-15-74	Statement of the issues submitted by counsel supporting complaint. Mailed: Paul, Weiss, Rifkind, Wharton & Garrison Sheerman & Sterling
3-19-74	Motion by respondents (1 to 4) for subpoenas duces tecum requiring the Commission to produce certain documents, with subpoena, exhibit A and affidavit of service.
3-19-74	Administrative law judge's order certifying motion by respondents (1 to 4 incl.) for an expedited schedule to the Commission. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 3-[illegible]-74 Sheerman & Sterling - 3-[illegible]-74
3-19-74	Application by Union Carbide Corporation, by its attorneys, Robert L. Wallace, Alexander W. Clerix, Union Carbide Corporation, 270 Park Avenue, New York, New York 10017, for an order granting protective relief, with respect to its production of documents in this proceeding.
3-20-74	Administrative law judge's order establishing March 25, 1974, as date that counsel supporting complaint may respond to motion by respondents (1 to 4 incl.) for subpoenas duces tecum. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 3-25-74 Sheerman & Sterling - 3-22-74

HISTORY

3-21-74	Supplement to motion by respondents (1 to 4) for a subpoena duces tecum, with attachment and affidavit of service.
3-21-74	Initial exhibit list submitted by counsel supporting complaint. Mailed: Paul, Weiss, Rifkind, Wharton & Garrison Shearman & Sterling
3-25-74	Opposition by counsel supporting complaint to motion by respondents (1 to 4 incl.) for issuance of subpoena duces tecum. Mailed: Paul, Weiss, Rifkind, Wharton & Garrison Shearman & Sterling
3-26-74	Request by counsel supporting complaint for admission of the truth of relevant facts. Served: Paul, Weiss, Rifkind, Wharton & Garrison 3-28-74 Shearman & Sterling - 3-28-74
3-28-74	Initial list of witnesses submitted by counsel supporting complaint. Mailed: Paul, Weiss, Rifkind, Wharton & Garrison Shearman & Sterling
3-29-74	Administrative law judge's order scheduling a prehearing conference for April 16, 1974, at 11 a.m., Washington, D.C., Room 332, Federal Trade Commission, 6th and Pennsylvania Avenue, N.W. Served: Paul, Weiss, Rifkind, Wharton & Garrison 4-3-74 Shearman & Sterling - 4-2-74
4-1-74	Supplemental memorandum by counsel supporting complaint in opposition to motion by respondents (1 to 4 incl.) for subpoena duces tecum. Mailed: Paul, Weiss, Rifkind, Wharton & Garrison Shearman & Sterling
4-1-74	Memorandum of law by respondents (1 to 4 incl.) in support of their motion for a subpoena duces tecum, with affidavit of service.

HISTORY

4-2-74	Order denying motion by respondents for fixed schedule, without prejudice. (Commissioners Dixon, Thompson and Hanford voted in the affirmative and Commissioners Engman was recorded as voting in the affirmative.) Served: Paul, Weinss, Rifkind, Wharton & Garrison - 4-11-74 Shearman & Sterling - 4-11-74
4-8-74	Application by counsel supporting complaint for issuance of subpoena duces tecum to third parties, with list of companies to whom subpoenas are to be directed. Mailed: Paul, Weiss, Rifkind, Wharton & Garrison Shearman & Sterling
4-10-74	Response by respondent (5) to initial request by counsel supporting complaint for admission of facts, with certificate of service.
4-11-74	Letter (treated as a motion) from Guidotti & Mullens, 43th & Shattuck, Oakland California 9460? attorneys for Pacific Oxygen Company, objecting to the subpoena issued to William Josephian; and request that in the event the ruling compels compliance that a protective order be issued covering documents subpoenaed.
4-11-74	Letter from Grier, Parker, Poe, Thompson, Burroughs, Gore & Preston, 1014 Law Building, Charlotte, N.C. 28202 attorneys for National Welders Supply Company, Inc., requesting confidential treatment for the documents supplied to the Commission on October 19,1973.
4-12-74	Request by counsel supporting complaint that respondents(1) be required to comply with subpoena duces tecum. Served: Paul, Weiss, Rifkind, Wharton & Garrison 4-17-74 Shearman & Sterling - 4-16-74
4-12-74	Response by respondents (1 to 4 incl.) to initial request by counsel supporting complaint for admission of facts, with affidavits.

HISTORY

4-12-74	Application by Big Three Industries, Inc., by its attorneys, Liddell, Sapp, Zivley & Brown, 510 Gulf Building, Houston, Texas 77002, for protective relief, and request permission to appear and be heard at the pretrial conference.
4-12-74	Opposition by Liquid Air, Inc., by its attorneys, Coudert Brothers, 200 Park Avenue, New York, N.Y. 10017, to motion by respondents (1 to 4 incl.) for issuance of subpoena duces tecum.
4-15-74	Initial list of witnesses submitted by respondent (5), with certificate of service.
4-15-74	Initial list of witness submitted by respondents (1 to 4 incl.)
4-17-74	Response by respondent (1 to 4 incl.) to request by counsel supporting complaint respondent be required to comply with subpoena duces tecum, with Exhibit A, B, & C.
4-17-74	Supplemental witness list submitted by counsel supporting complaint. Mailed: Paul, Weiss, Rifkind, Wharton & Garrison Shearman & Sterling
4-17-74	Motion by counsel supporting complaint for a protective order for sensitive third party documents. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 4-19-74 Shearman & Sterling - 4-19-74
4-18-74	Administrative law judge's order scheduling prehearing conference for April 25, 197 at 11:00 a.m., Washington, D.C. Room 3?, 6th and Pennsylvania Avenue, N.W. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 4-22-74 Shearman & Sterling - 4-19-74

(Cont'd on reverse side of sheet)

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HISTORY

4-22-74 Administrative law judge's order scheduling hearing to begin May 6, 1974 at 9:30 a.m., Washington, D.C., Room 7314, 414 -11th Street, N.W.
Served:
Paul, Weiss, Rifkind, Wharton & Garrison - 4-25-74
Sherman & Sterling - 4-24-74

4-22-74 Letter from Covington & Burling, 888 16th Street, N.W. Washington, D.C., 20006, attorneys for Air Products and Chemicals, Inc. requesting that subpoena be quashed or limited; and further requesting a stay of any order requiring production of documents to permit an appeal to the Commission or the courts.

4-23-74 Administrative law judge's order ruling on motion by respondents (1 to 4 inclusive) for issuance of subpoena duces tecum, seeking production, inter alia, of two categories of documents from the Commission, with attachments.
Served:
Paul, Weiss, Rifkind, Wharton & Garrison - 4-25-74
Sherman & Sterling - 4-25-74

4-24-74 Application by counsel supporting complaint for issuance of subpoenas ad testificandum and subpoenas duces tecum to third parties, with list of witnesses.
Mailed:
Paul, Weiss, Rifkind, Wharton & Garrison
Sherman & Sterling

4-24-74 Administrative law judge's order granting extension of time to May 3, 1974 to Narco Scientific Industries, Inc., to respond to subpoena duces tecum.
Served:
Paul, Weiss, Rifkind, Wharton & Garrison - 4-25-74
Sherman & Sterling - 4-24-74
Narco Scientific Industries, Inc. - 5-1-74

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HISTORY

4-24-74 Administrative law judge's order revising the protective order of order ruling on motion by respondents (1 to 4 incl) for a subpoena duces tecum.
Served:
Paul, Weiss, Rifkind, Wharton & Garrison - 4-26-74
Sherman & Sterling - 4-26-74

4-25-74 Initial Exhibit list submitted by respondents (1 to 4 incl.)

4-25-74 Administrative law judge's order extending time to April 25, 1974 to Howard Wickstra, Alza Medical Division of Shorwood Medical Industries, to make return on the subpoena duces tecum.
Served:
Paul, Weiss, Rifkind, Wharton & Garrison - 4-25-74
Sherman & Sterling - 4-29-74
Howard Wickstra - 4-29-74

4-25-74 Administrative law judge's order extending time to April 30, 1974, to John W. Boal, Jr. President, Duval, Inc., to make return on the subpoena duces tecum.
Served:
Paul, Weiss, Rifkind, Wharton & Garrison -
Sherman & Sterling - 4-29-74
John W. Boal, Jr. -4-30-74

4-25-74 Calendar of witnesses to testify in the week of May 6, 1974, with list of additional witnesses expected to testify and supplemental list of exhibits submitted by counsel supporting complaint.
Mailed:
Paul, Weiss, Rifkind, Wharton & Garrison
Sherman & Sterling

4-25-74 Motion by North American Dranger by its attorneys Alexander & Green, 299 Park Avenue, New York, N.Y. 10017, for extension of time to May 3, 1974 to comply with the subpoena duces tecum, with certificate of service.

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HISTORY

4-26-74 Letter from counsel for North American Dranger correcting the motion for extension of time to read May 10, 1974 instead of May 3, 1974.

4-29-74 Administrative law judge's order extending time to May 3, 1974, to American Dranger to respond to the subpoena duces tecum.
Served:
Paul, Weiss, Rifkind, Wharton & Garrison - 5-2-74
Sherman & Sterling - 5-1-74
Alexander & Green - 5-1-74

4-29-74 Initial Exhibit list submitted by respondents (5)

4-29-74 Application by counsel supporting complaint for issuance of subpoenas to third parties, with list of companies attached.
Mailed:
Paul, Weiss, Rifkind, Wharton & Garrison
Sherman & Sterling

4-29-74 Application by counsel supporting complaint for review of administrative law judge's order requiring production documents from the Commission files.
Mailed:
Paul, Weiss, Rifkind, Wharton & Garrison
Sherman & Sterling

4-30-74 Appeal by counsel for Air Products and Chemicals, Inc. from the administrative law judge's ruling on motion by respondents (1-4 inclusive) for issuance of subpoena duces tecum, with certificate of service.

4-30-74 Supplemental request by counsel supporting complaint for admission of facts.
Served:
Paul, Weiss, Rifkind, Wharton & Garrison - 5-1-74
Sherman & Sterling - 5-1-74

4-30-74 Application for review and appeal by Union Carbide Corporation by its attorneys, Wald, Harkrader and Ross, 1320 19th St., N.W., Washington, D.C. 20036, from the administrative law judge's ruling requiring the production of documents.

(can't read what is)

DATE	HISTORY
4-30-74	Application by Liquid Air, Inc. by its attorneys, Coudert Brothers, 200 Park Avenue, New York, New York 10017 for review of the administrative law judge's ruling on motion by respondents (1-5 incl) for a subpoena duces tecum, with certificate of service.
5-1-74	Application by Chemetron Corporation by its attorneys, Kirkland & Ellis, 2000 Prudential Plaza, Chicago, Illinois 60601 for interlocutory appeal of the administrative law judge's ruling regarding production of documents.
5-1-74	Interlocutory appeal by counsel for Big Three Industries, Inc., from the administrative law judge's ruling regarding production of documents.
5-3-74	Calendar of witnesses submitted by counsel supporting complaint. Mailed: Paul, Weiss, Rifkind, Wharton & Garrison Sherman & Sterling
5-3-74	Application by counsel supporting complaint for issuance of subpoenas to various third parties: with list of witnesses. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 5-8-74 Sherman & Sterling - 5-8-74
5-6-74	List of outside counsel who will have access to documents produced pursuant to subpoena submitted by respondents (1 thru 4 incl.), with affidavit of service.
5-6-74	List of additional witnesses submitted by respondents (1 thru 4 incl.), with affidavit of service.
5-6-74	Administrative law judge's order granting motion by counsel supporting complaint for protective order. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 5-8-74 Sherman & Sterling - 5-8-74
5-6-74	List submitted by respondent (5) of outside counsel who will have access to documents produced pursuant to subpoena.
5-6-74	Objections by respondents (1 thru 4 incl.) to supplemental request by counsel supporting complaint for admission of facts, with affidavit of service.
5-6-74	Supplemental exhibit list submitted by respondents (1 thru 4 incl.), with affidavit of service.
5-6-74	Answer by respondents (1 thru 4 incl.) to application for review of order re production of documents, with affidavit of service.
5-10-74	Administrative law judge's order directing that exhibits CX 70 thru CX 78 and CX 95 thru CX 98 received in evidence and rejected exhibit CX 777 designated for in camera treatment shall remain in in camera status until January 1, 1978. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 5-1, 7. Sherman & Sterling - 5-13-7. Alderson Reporting Company - 5-13-74
5-13-74	Administrative law judge's order directing that exhibits CX 232 A-747, 264 A-S and 265 A-H received in evidence in in camera status shall remain in that status until January 1, 1978. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 5-15-74 Sherman & Sterling - 5-16-74 Alderson Reporting Company - 5-15-74
5-13-74	Administrative law judge's order directing that CX 160 received in in camera status shall remain in that status until January 1, 1978, and that exhibits CX 159, 164, 169 and 181 thru 185 shall remain in in camera status until January 1, 1978. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 5-16-74 Sherman & Sterling - 5-15-74 Alderson Reporting Company - 5-15-74
5-13-74	Response by respondents (1 thru 4) to supplemental request by counsel supporting complaint for admission of facts, with certification.
5-13-74	Response by respondent (5) to supplemental request by counsel supporting complaint for admission of fact, with sworn statement and certificate of service.
5-20-74	Supplemental list of witnesses submitted by respondents (1 thru 4 incl.), with affidavit of service.
5-20-74	Supplemental list of witnesses submitted by respondent (5), with certificate of service.
5-24-74	Administrative law judge's order scheduling hearings to commence June 5, 1974, at 10:00 a.m., New York, N. Y., Room 1-22 Federal Trade Commission Offices, Federal Building, 26 Federal Plaza, for presentation of case in defense. Served: Paul, Weiss, Rifkind, Wharton & Garrison - Sherman & Sterling -
5-24-74	Amended answer filed by respondents (1 -
5-24-74	Administrative law judge's order receiving the following exhibits: CX 174, CX [illegible] and RX 202, in in camera status until January 1, 19[illegible]. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 5-29-74 Sherman & Sterling - 5-29-74 Alderson Reporting Co. - 5-3-74
5-29-74	Order directing that the administrative judge's prior determination, [illegible] is affirmed [illegible] Commission for review, further directing that exhibit [illegible] shall remain in camera status [illegible] Commission's order of April 23, [illegible] Commission, Dixon, Thomas [illegible] dissenting in the affirmative) Served: Paul, Weiss, Rifkind, Wharton & Garrison - 5-31-74 Sherman & Sterling - 5-31-74 Kirkland & Ellis - 6-3-74 Coudert Brothers, Inc. - 6-3-74 Baker, Purr, [illegible]ley & Freer - 6-4-74 Weld, Fuhrader & Ross - 6-3-74 Covington & Burlington - 6-3-74

(continue on reverse side of sheet)

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6-6-74	Second supplemental exhibit list submitted by respondents (1 and 4), with affidavit of service.	6-26-74	Administrative law judge's order scheduling hearing for June 27, 1974, at 10:00 A.M. Washington, D.C., Room 7314, 1100 Building 424-11th Street, N. W. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 7-1-74 Sherman & Sterling - 7-1-74	SESSION	New York, N. Y. - June 6,1974-2717 June 6,1974-2783 June 7,1974-2831 June 12,1974-2102-2163 June 13,1974-2164-2464 June 14,1974-2465-2543 Washington, D. C.- June 18,1974-2681-2705 June 27,1974-2706-2797 (Oral arg.)April 30, 1975- 1 - 57
6-12-74	Administrative law judge's order receiving CX 302 AJ, 302 A-B4, 302 A-B15, 302 A-B16, 302 A-C, 302 A-D, 302 A-E, 302 A-F, 333, BDC RX 43 A-I, 302 A-J, 302 A-K, 94 A-I, BDC RX 235, in camera status and to remain until January 1, 1978; and receiving BDC RX 54 A-I, 302 A-L in camera until July 8, 1974. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 6-13-74 Sherman & Sterling - 6-14-74 Alderson Reporting Company - 6-11-74	6-28-74	Administrative law judge's order stating that respondent BDC's Exhibit 256 was ruled I in camera at the hearing on June 27, 1974, to remain in camera until January 1, 1978. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 7-3-74 Sherman & Sterling - 7-3-74		
6-17-74	Administrative law judge's order receiving exhibit 302A-L in in camera & to remain in in camera status until January 1, 1978. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 6-20-74 Sherman & Sterling - 6-19-74	7-9-74	Designation of Stanford Research Institute offered into evidence by counsel supporting complaint, with exhibits attached. Mailed: Paul, Weiss, Rifkind, Wharton & Garrison Sherman & Sterling		
6-17-74	Administrative law judge's order incorporating into record results of informal conference of June 17, 1974. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 6-20-74 Sherman & Sterling - 6-19-74	7-10-74	Motion by counsel supporting complaint to substitute proposed exhibit CX-302-L for CX-302-L. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 7-15-74 Sherman & Sterling - 7-12-74		
6-17-74	Administrative law judge's order scheduling hearing for June 27, 1974, at 10:00 a.m., Washington, D.C., Room 7314, 1100 Building 424 11th Street, N.W. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 6-20-74 Sherman & Sterling - 6-19-74	7-11-74	Administrative law judge's order withdrawing CX 302A-G from the record and placing CX 302A-H in evidence in its place and stead, in in camera status until January 1, 1978. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 7-15-74 Sherman & Sterling - 7-15-74		
6-24-74	Administrative law judge's order receiving exhibit 2-4 to remain in IN CAMERA status until January 1, 1978. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 6-24-74 Sherman & Sterling - 6-25-74		(Cont'd on sheet 14, column 1)		

HISTORY

7-25-74	Response by respondents (1-4) to complaint counsel's offer of documents from Stanford Research Institute into evidence, with affidavit of service.
7-26-74	Administrative law judge's order directing that proposed findings and supporting memoranda, etc to filed on or before August 2, 1974 and further directing that replies thereto be filed on or before August 12, 1974. Served: Paul, Weiss, Rifkind, Wharton & Garrison - Shearman & Sterling -
7-30-74	Offer by respondents (1-4) of exhibits BMC RX 261A-C, BMC RX 262A-1 and BMC RX 263A-C into evidence.
7-31-74	Opposition by counsel supporting complaint to offer by respondents (1-4) of certain exhibits into evidence. Mailed: Paul, Weiss, Rifkind, Wharton & Garrison Shearman & Sterling
8-1-74	Administrative law judge's order directing that CX 342 A-F be received in evidence; further directing that BMC RX 252, 254 and 255 are received in evidence; and further directing that BMC RX 260 A-F is rejected. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 8-8-74 Shearman & Sterling - 8-8-74
8-1-74	Administrative law judge's order directing that CX 326-L and CX 334-7-55 be received in evidence in IN CAMERA, status until January 1, 1975. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 8-8-74 Shearman & Sterling - 8-8-74
8-1-74	Motion by counsel supporting complaint to correct order of July 25, 1974. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 8-8-74 Shearman & Sterling - 8-8-74

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FTC 4-4030

8-2-74	Proposed findings of fact, conclusions of law and order submitted by counsel supporting complaint. Mailed: Paul, Weiss, Rifkind, Wharton & Garrison - Shearman & Sterling -
8-2-74	Proposed findings of fact conclusions of law and order IN CAMERA (Mailed with proposed findings)
8-2-74	Administrative law judge's order ruling on motion by counsel supporting complaint to correct order of July 25, 1974. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 8-8-74 Shearman & Sterling - 8-8-74
8-2-74	Administrative law judge's order directing that BMC RX 260 and 263 be received in the record on basis of official notice; and further directing that RX 261 is rejected. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 8-8-74 Shearman & Sterling - 8-8-74
8-2-74	Administrative law judge's order closing the record for the reception of evidence. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 8-8-74 Shearman & Sterling - 8-8-74
8-5-74	Motion by counsel supporting complaint to strike testimony by Dr. Andrew G. Kelly. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 8-8-74 Shearman & Sterling - 8-8-74
8-5-74	Proposed findings of fact, conclusions of law etc submitted by respondent (s), with certification of service.
8-6-74	Motion by counsel supporting complaint for extension of time to file reply briefs to proposed findings until twenty (20) days after filing by respondents (1-4) of their proposed findings etc. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 8-9-74 Shearman & Sterling - 8-9-74

8-7-74	Proposed findings of fact conclusions of law and order submitted by respondents (1-4)
8-7-74	Supplement to proposed findings submitted by respondents (1-4) IN CAMERA
8-8-74	Administrative law judge's order granting extension of time to August 22, 1974 to all parties, via telephone, to file reply briefs. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 8-14-74 Shearman & Sterling 8-14-74
8-12-74	Offer of CX 343A-L and CX 344A-K by counsel supporting complaint to offer into evidence on the basis of official notice, with attachments. Mailed: Paul, Weiss, Rifkind, Wharton & Garrison - Shearman & Sterling -
8-12-74	[illegible]
8-16-74	Motion by counsel supporting complaint to reopen record for receipt of CX 345 A from Stanford Research Institute into evidence in IN CAMERA status, with attachment. Served: Paul, Weiss, Rifkind, Wharton & Garr 8-21-74 Shearman & Sterling - 8-21-74
8-22-74	Reply made by counsel supporting complaint to respondents' proposed findings of fact and conclusions. Mailed: Paul, Weiss, Rifkind, Wharton & Garri Shearman & Sterling
8-22-74	Reply by counsel supporting complaint to respondents' proposed findings of fact and conclusions IN CAMERA (Mailed with reply to proposed findin
8-22-74	Response by respondents (1-4) to counsel supporting complaint's offer of CX 343 and CX 344, with affidavit of service.
8-22-74	Reply by respondents (1-4) to proposed findings by counsel supporting complaint with affidavit of service. (Continued on reverse side of sheet)

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DOCKET	HISTORY		HISTORY		HISTORY
8-28-74	Administrative law judge's order denying motion by counsel supporting complaint to strike testimony of Dr. Andrew G. Kridl. Served: Paul, Weiss, Rifkind, Wharton & Garrison - Shearman & Sterling - 8-30-74	10-18-74	Administrative law judge's initial decision and order of divestiture. Served: CSC - K. K. Thurman - CSC - G. Youngquist - 10-31-74 CSC - D. Purcell - CSC - D. A. Nickel - 10-31-74 CSC - K. H. Krulle - Paul, Weiss, Rifkind, Wharton & Garrison - 10-31-74 Shearman & Sterling - 10-31-74	11-26-74	Motion by respondent (1-4) for extension of time to February 13, 1975 to file its appeal brief, with affidavit of service.
8-28-74	Administrative law judge's order directing that CX 343 A-L and CX 344 A-K are received in evidence and further directing that respondents (1-4) may file a memorandum dealing with any portion of reply brief by counsel supporting complaint re these exhibits, said memo to be filed within ten days of their receipt of this order. Served: Paul, Weiss, Rifkind, Wharton & Garrison - Shearman & Sterling - 8-30-74	11-6-74	Notice by respondents (1 thru 4) of appeal from administrative law judge's initial decision, with affidavit.	11-29-74	Opposition by counsel supporting complaint to motion by respondent (1-4) for additional time to file appeal brief. Mailed: Paul, Weiss, Rifkind, Wharton & Garrison Shearman & Sterling
		11-6-74	Motion by respondents (1 thru 4) for extension of time to file appeal from administrative law judge's initial decision, with affidavit.	12-3-74	Order denying motion by respondent (1-4) for further extension of time to file appeal brief. Served: Paul, Weiss, Rifkind, Wharton & Garrison - Shearman & Sterling -
8-28-74	Administrative law judge's order directing that CX 342 A-M and RSC RX 1-4 are received in evidence to remain in IN CAMERA status until January 1, 1999 and further directing that no additional briefings be made by any party re these exhibits. Served: Paul, Weiss, Rifkind, Wharton & Garrison - Shearman & Sterling - 8-30-74	11-8-74	Notice of intention to appeal by respondent (5), with certificate of service.	12-9-74	Motion by respondents 1 thru 4 for correction of the transcript with appendix and affidavits of service.
		11-11-74	Motion by respondent (5) for an extension of time to December 30, 1974 to file its appeal brief, with certificate of service.	12-9-74	Stipulation between counsel for the parties for correction in the transcript.
9-11-74	Motion by counsel supporting complaint to correct record, re exhibit CX 90. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 9-12-74 Shearman & Sterling - 9-16-74	11-11-74	Order extending time to December 30, 1974 to respondents (1 - 4) to file their appeal brief. Mailed: Paul, Weiss, Rifkind, Wharton & Garrison Shearman & Sterling	12-10-74	Petition by respondents 1 thru 4 for reconsideration of order denying motion for additional time to file appeal brief, with affidavit of service.
9-13-74	Administrative law judge's order receiving exhibits CX90 in evidence. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 9-19-74 Shearman & Sterling - 9-18-74	11-12-74	Order extending time to December 30, 1974 to respondent (5) to file its appeal brief. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 11-18-74 Shearman & Sterling - 11-15-74	12-12-74	Order granting extension of time to January 20, 1975 to respondents 1 thru 4 to file their appeal brief. Mailed: Paul, Weiss, Rifkind, Wharton & Garrison Shearman & Sterling
		11-20-74	Addition by respondent (1-4) to their list of outside counsel who will have access to documents produced pursuant to subpoena.	12-20-74	Motion by respondent (5) for an extension of time to January 30, 1975 to file their appeal brief, with certificate of service.
		11-20-74	Addition to list of outside counsel who will have access to documents produced pursuant to subpoena.	12-23-74	Order extending time to January 20, 1975 to respondent (5) to file their appeal brief providing said respondents inform U. S. District Court for the District of Delaware etc. Mailed: Paul, Weiss, Rifkind, Wharton & Garrison Shearman & Sterling
					(cont'd on sheet 4e column 1)

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7341.

	HISTORY
1-9-75	Motion by respondents (1-4 inclusive) for leave to file appeal brief not to exceed 120 pages, with affidavit of service.
1-10-75	Order granting request by respondents (1-4 inclusive) for leave to file appeal brief in excess of sixty (60) pages. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 1-17-75 Shearman, & Sterling - 1-17-75
1-10-75	Administrative law judge's order directing that corrections to transcript be made. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 1-17-75 Shearman & Sterling - 1-17-75 Alderson Reporting Co. - 1-17-75
1-13-75	Administrative law judge's order directing that corrections be made in the offical transcript of this proceeding, with stipulation. Served: Paul, Weiss, Rifkind, Wharton & Garrison Shearman & Sterling - Alderson Reporting Co. - 1-21-75
1-20-75	Brief by respondents (1-4)- Appeal from Administrative law judge's initial decision, with affidavit of service.
1-23-75	Brief by respondent (5) Appeal from administrative law judge's initial decision, with certificate of service.
1-29-75	Motion by counsel supporting complaint for extension of time to April 5, 1975 to file answering brief. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 2-3-75 Shearman & Sterling - 2-3-75

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FTC 4-6-68

	HISTORY
2-4-75	Order extending time to April 5, 1975 to counsel supporting complaint to file answering brief. Mailed: Paul, Weiss, Rifkind, Wharton & Garrison Shearman & Sterling
2-21-75	Notice setting oral argument on appeal by respondent from administrative law judge's initial decision for May 1, 1975 at 2:00 p.m., Washington, D. C. Served: Paul, Weiss, Rifkind, Wharton & Garrison Shearman & Sterling- 2-28-75 Alderson Reporting Company - 3-3-75
3-3-75	Motion by respondent (5) to reschedule oral argument, with certificate of service.
3-12-75	Order rescheduling oral argument for April 30, 1975 at 2:00 p.m. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 3-13-75 Shearman & Sterling - 3-13-75 Alderson Reporting Company - 3-13-75
4-1-75	Motion by counsel supporting complaint for leave to file an answering brief not to exceed 100 pages. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 4-4-75 Shearman & Sterling - 4-4-75
4-3-75	Order granting leave to counsel supporting complaint to file a brief in excess of sixty pages. Mailed: Paul, Weiss, Rifkind, Wharton & Garrison Shearman & Sterling
4-7-75	Brief by counsel supporting complaint - Answer to appeal by respondent from administrative law judge's initial decision. Served: Paul Weiss, Rifkind, Wharton, & Garrison - PS - 4-7-75 Shearman & Sterling - PS - 4-7-75
4-7-75	Motion by respondent for additional time to file reply briefs and enlargement of time for oral argument.

	HISTORY
4-8-75	Opposition by counsel supporting complaint motion by respondent for additional time file reply briefs. Mailed: Paul, Weiss, Rifkind, Wharton & Garrison - Shearman & Sterling -
4-11-75	Order extending time to April 21, 1975 to respondents to file reply brief. Mailed: Paul, Weiss, Rifkind, Wharton & Garrison - Shearman & Sterling -
4-21-75	Brief by respondent (1 thru 4) - Reply to answer by counsel supporting complaint to appeal by respondent from administrative law judge's initial decisi
4-15-75	Order denying motion by respondent for enlargement of time for oral argument. Served: Paul, Weiss, Rifkind, Wharton & Garrison - 4-15-75 Shearman & Sterling - 4-15-75
4-30-75	Argument heard on appeal of counsel for respondent from administrative law judge's initial decision.
12-8-75	Order denying appeal by respondent from administrative law judge's initial decisi (contained in Final Order issued 12-8-75)
12-8-75	Final Order (Adopting after modification administrati law judge's initial decision and order t cease and desist) and order to file rep of compliance. Opinion of Commission - Attached Commissioners Ingram, Dixon & Sibley voted i the affirmative and Commissioner Manford recorded as voting in the affirmative Served: Paul, Weiss, Rifkind, Wharton & Garriso Shearman & Sterling -
2-6-76	Petition to review-----(filed by BOC International Limited, et al) (For Court Action, see Sheet 3)

In the matter of BRITISH OXYGEN COMPANY, LIMITED, et al

FEDERAL TRADE COMMISSION
COMPLAINTS

No. 8955

Sheet 2

RESPONDENTS	Complaint Served	Answer Filed	Initial Decision Served	Commission Decision Served	Compliance Report Filed	ATTORNEYS
5. Airco, Inc. (retained) Montvale, New Jersey 07645	2-27-74	3-12-74	11-1-74			
The Attorney General Department of Justice Washington, D. C. 20530 Attn: William W. Swope	2-27-74					

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COURT PROCEEDINGS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

No. 74-31

Attorneys:

Sherman & Sterling
53 Wall Street
New York, N. Y. 10005

Richards, Layton & Finger
4072 Tupent Building
Wilmington, Delaware 19899

2-26-74	Application by Commission moving the Court for (1) a temporary restraining order and (2) a preliminary injunction, against British Oxygen Company, Limited (BOC), BOC Financial Corporation, (BOC Financial) BOC Holdings, Limited (BOC Holdings) and British Oxygen Investments Limited (Investments), restraining them from exercising and exercising control of Airco, Inc. (Airco), pending the completion of administrative proceedings, on an expedited basis against them, in order to adequately assure that the Commission can obtain effective relief in the event that the allegations of the administrative complaint are sustained and to prevent the occurrence of irreparable adverse effects to the public, with attachments. (RDG 2-27-74)
2-28-74	Order: Granting application by Commission for a temporary restraining order and directing that the temporary restraining order will expire on March 11, 1974, at 5:00 p.m., unless within such time it is, for good cause shown, extended by the Court for an additional ten days or unless the respondents consent that it may be extended for a longer period and further directing any adverse parties to appear on March 8, 1974, at 9:30 a.m., and show cause why this Court should not enter a preliminary injunction and to produce any proof and file any affidavits, other documents or memorandum in support of their position prior to 5:00 p.m. on March 6, 1974. (RDG 3-5-74)
3-1-74	Praecipe order. (RDG 3-5-74)
3-6-74	Memorandum by Airco, Inc., in opposition to application by Commission for preliminary injunction, with attachments. (RDG 3-13-74)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

No. 74-31 (cont'd.)

3-6-74	Brief by British Oxygen Company, Ltd., in opposition to application for a preliminary injunction. (RL 3-13-74)
3-8-74	Order: Granting preliminary injunction, with certain conditions and directing that the temporary restraining order entered in this action is hereby dissolved. (RDG 3-13-74)
3-11-74	Order: Amending preliminary injunction issued on March 8, 1974. (RDG 3-13-74)
3-13-74	Notice of motion and motion by Airco, Inc., for limited rearrangement of the preliminary injunction issued March 8, 1974, and modified March 11, 1974. (RDG 3-25-74)
3-19-74	Response by Commission to motion by Airco, Inc., for limited rearrangement, with certificate of service. (RDG 3-25-74)
3-28-74	Memorandum Opinion and Order: Denying motion by Airco, Inc., for limited rearrangement. Opinion: (RDG 4-3-74)
4-8-74	Notice of appeal bond. (RDG 4-15-74)
4-8-74	Notice of appeal to the United States Court of Appeals for the Third Circuit filed by British Oxygen Company, Ltd., et al. (RDG 4-15-74)
5-3-74	Stipulation: Subject to Court's approval, exhibit G shall be withdrawn from the public files of this Court and placed in a suitable file to prevent further distribution or examination by persons other than the parties of this action and their counsel and by this Court or any reviewing Court, with attachment. (RDG 6-14-74)

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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 74-1492

Attorneys:

Richard I. McMahon
Potter, Anderson & Corroon
305 Delaware Trust Building
Wilmington, Delaware

Jay H. Topkis
Paul, Weiss, Rifkind, Wharton & Garri
345 Park Avenue
New York, N. Y. 10022

4-8-74	Notice of appeal from order of United States District Court for the District of Delaware.
6-4-74	Designation of the parts of the record to be included in the appendix filed by Airco, Inc. (RDG 6-13-74)
6-28-74	Motion by Airco, Inc., for an extension of time to July 15, 1974 to file its brief and appendix, with attachments. (RDG 7-10-74)
7-29-74	Brief for Airco, Inc., filed. (RDG 8-6-74)
8-8-74	Motion by British Oxygen Company, Ltd., et al., to consolidate appeal into two appeals and stay all proceedings on the remanded appeal until the final determination of the proceeding now pending before the Commission, etc., with attachment. (RDG 8-23-74)
8-19-74	Response by Airco, Inc. to motion by B. to sever and stay part of this appeal, with certificate of service. (RDG 8-23-74)
8-21-74	Motion by Commission to dismiss the appeal of BOC.
8-21-74	Opposition by Commission to motion by B. to sever and stay appeal.

(cont'd. on reverse side of sheet)

UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

No. 74-1492 (cont'd.)

8-30-74 Stipulation:
Subject to Court's approval, (1)the opposition by the Commission to motion to stay appeal is hereby withdrawn; (2) motion by Commission to dismiss appeal of BOC is withdrawn; (3) that the time for BOC to file its brief in support of its appeal be extended; (4) that the Commission be allowed to file a supplemental paper in opposition to motion for severance within fourteen days of the date hereof; (5) that BOC be allowed to file reply papers on the pending motion within twenty-eight days of the date hereof.
(RLS 9-3-74)

9-10-74 Supplemental statement by Commission in opposition to motion by British Oxygen Company, Ltd., for severance of parties or issues, with certificate of service.
(RLS 9-11-74)

9-11-74 Supplemental response by Airco, Inc. to motion by British Oxygen Company, Ltd. to sever and stay; and response to supplemental statement by Commission in opposition to motion to sever.
(RLS 9-13-74)

9-24-74 Reply memorandum by British Oxygen Company, Ltd. in support of its motion to sever and stay.
(RLS 10-3-74)

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9-26-74 Order:
Denying motion for severance; directing that the Court disapproves the stipulation as submitted but grants the motion for stay as provided in the stipulation and approves the stipulation on condition that the terminal date for filing of briefs and proceeding with this appeal; and stating that if the appeal is to be prosecuted, be no later than December 31, 1974.
(RLS 10-3-74)

9-30-74 Brief for Commission filed.
(9-30-74)

- - - Reply brief for Airco, Inc., filed.
(RLS 10-24-74)

PUBLIC RECORD COPY

6-17-74	Letter from Robert J. Lewis, Assistant to the Chairman, to Honorable Louis C. Wyman, U. S. Congress, with attachment.		
12-9-75	Letter to Lewis A. Engman, Chairman, from Jay Topkins, Paul,Weiss,Rifkind, Wharton & Garrison.		
12-11-75	Letter to Jay Topkins, Esquire from Charles A. Tobin, Secretary, Federal Trade Commission.		

FTC 4-433n

COURT PROCEEDINGS

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT		UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT	
	No. 76-4044		No. 76-4045
	ATTORNEYS: Jay H. Topkis Lewis A. Kaplan Moses Silverman Paul, Weiss, Rifkind, Wharton & Garrison 345 Park Avenue New York, N. Y. 10022		ATTORNEYS: W. Foster Wollen R. Bruce MacWhorter Danforth Newcomb Gabrielle R. Campbell Shearman & Sterling 53 Wall Street New York, N. Y. 10005
2-6-76	Petition for review filed by BOC International Limited, et al.	2-6-76	Petition for review filed by Airco, Inc.

FTC 4-5178

HISTORY

2-6-76	Petition to review--------(filed by Airco, Inc.) (for Court Action, See Sheet 3a, 2nd Col.)

A 16

UNITED STATES OF AMERICA

BEFORE

FEDERAL TRADE COMMISSION

DOCKET NO. 8955

IN THE MATTER OF:

BRITISH OXYGEN COMPANY, LIMITED, et al

COMPLAINT

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	
BRITISH OXYGEN COMPANY, LIMITED,	
BOC FINANCIAL CORPORATION,	
BOC HOLDINGS, LIMITED,	DOCKET NO. 9250
BRITISH OXYGEN INVESTMENTS, LIMITED,	
AIRCO, INCORPORATED.	

COMPLAINT

The Federal Trade Commission, having reason to believe that British Oxygen Company, Ltd. (hereinafter "BOC"), BOC Financial Corporation (hereinafter "BOC Financial"), BOC Holdings, Ltd. (hereinafter "BOC Holdings"), and British Oxygen Investments, Ltd. (hereinafter "BO Investments"), respondents herein, have violated the provisions of Section 7 of the Clayton Act, as amended (15 U.S.C. Sec. 18), and that the above named respondents and Airco, Inc. (hereinafter "Airco"), respondent herein, have further violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. Sec. 45), through the acquisition by BOC Financial of four million shares of stock of Airco, and that a proceeding in respect thereof would be in the public interest, issues the complaint, stating its charges as follows:

I

Definitions

1. For the purpose of this complaint, the following definitions shall apply:

(a) "Industrial gases" are gases in compressed, liquid and solid form including acetylene, carbon dioxide, carbon monoxide, argon, helium, hydrogen, nitrogen, oxygen, nitrous oxide, other medical gases, rare gases, and mixtures and combinations thereof.

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(b) "Inhalation anesthetic equipment" is equipment and accessories used in the administration of gas for anesthetic purposes.

(c) "Inhalation therapy equipment" is equipment and accessories used in the administration of gas for therapeutic purposes.

(d) "Medical pipeline systems" are networks of equipment used to transport medical gas from hospital storage facilities to patient and operating rooms.

II

British Oxygen Company, Limited

2. Respondent, BOC is a United Kingdom Company with principal executive offices at Hammersmith House, London W6, England.

3. BOC is engaged in the manufacture and sale of industrial gases, including rare gases and medical gases; welding equipment; special metals; air separation equipment; medical equipment, including inhalation anesthetic equipment, inhalation therapy equipment and medical pipeline equipment; aircraft breathing equipment; vacuum equipment and instrumentation; and food products. In 1972 BOC group sales totalled 252.6 million pounds sterling, or $606 million at an exchange rate of $2.40 to the pound.

4. Since 1968, BOC has actively attempted to enter the United States market and has contacted several smaller U.S. firms in the industrial gases, inhalation therapy equipment, inhalation anesthetic equipment, and medical pipeline system markets regarding possible acquisition by BOC. It is considered to be one of the very few companies with the expertise, capital, incentive, and interest to enter the U.S. markets described above.

5. In October, 1973, BOC established Medishield, Inc., a Delaware corporation, to act as a holding company in consolidating BOC medical product activities in the United States and Canada and in attempting to become a major factor in the United States markets.

6. BOC competes directly with Airco in the United States markets in inhalation anesthetic equipment and inhalation therapy equipment. It is the largest manufacturer and distributor of inhalation anesthetic equipment in the United Kingdom and is a significant competitor in this market in the European Economic Community.

7. BOC is a substantial competitor in the United States market in inhalation anesthetic equipment. It manufactures and distributes inhalation anesthetic equipment in the United States through its subsidiaries, Harris Lake and Fraser Sweatman.

8. BOC is the largest manufacturer and distributor of inhalation therapy equipment in the United Kingdom and is a significant competitor in this market in the European Economic Community. BOC markets inhalation therapy equipment in the United States through its subsidiary, Harris Lake.

9. BOC produces and distributes medical pipeline systems in the United Kingdom and is a significant competitor in this market in the European Economic Community.

10. In 1972, BOC was the second largest producer of industrial gas in the world. In each of the nineteen countries in which it produces industrial gas, BOC is a significant competitor, and in most of these countries BOC is the dominant competitor.

11. At all times relevant herein, BOC, through its subsidiaries, sold and shipped its products in interstate commerce and engaged in "commerce" within the meaning of the Clayton Act and the Federal Trade Commission Act.

III

BOC Financial Corporation

12. Respondent, BOC Financial is a corporation organized and existing under the laws of the State of Delaware, with a business address of 306 South State Street, Dover, Delaware. BOC Financial was organized solely for the purpose of acquiring shares of Airco, Inc. through a tender offer announced on December 10, 1973. All BOC Financial's common stock is owned by BOC Holdings, Limited.

IV

BOC Holdings, Limited

13. Respondent, BOC Holdings is a United Kingdom Company with a business address of Hammersmith House, W6, England. BOC Holdings is engaged in holding various securities of direct and indirect subsidiaries of BOC. All outstanding ordinary shares of BOC Holdings are held by BO Investments.

V

British Oxygen Investments, Limited

14. Respondent, BO Investments is a United Kingdom Company with a business address of Hammersmith House, London W6, England. BO Investments is engaged in holding various securities of direct and indirect subsidiaries of BOC. BO Investments is a wholly-owned subsidiary of BOC.

VI

BOC

15. For purposes of this complaint, BOC shall be read to include all subsidiary or related corporations and all successor corporations.

VII

Airco, Inc.

16. Respondent, Airco is a publicly owned corporation, organized and existing under the laws of the State of New York, with its principal place of business in Montvale, New Jersey.

17. Airco is engaged in the manufacture of industrial gases, including medical gases; ferroalloys and carbide; cryogenic equipment; welding and cutting equipment; carbon;

graphite; electronics; metals; and medical equipment, including inhalation anesthetic equipment, inhalation therapy equipment, and medical pipeline equipment. Airco operations in the industrial gas market are conducted through three divisions: Airco Industrial Gases Division, Airco Welding Products Divisions, and Ohio Medical Products Division. Airco is the second largest producer of industrial gas in the United States.

18. Airco operations in the markets for inhalation anesthetic equipment, inhalation therapy equipment, and medical pipeline equipment are conducted through the Ohio Medical Products Division. Airco competes directly with BOC in the United States markets for inhalation anesthetic equipment and inhalation therapy equipment.

19. Airco, through its Ohio Medical Products Division is the leading company in the United States inhalation anesthetic equipment market.

20. Through its Ohio Medical Products Division, Airco is one of the three leading companies in the United States inhalation therapy equipment market. Through its Ohio Medical Products Division, Airco is the leading company in the medical gas pipeline systems market in the United States.

21. At all times relevant herein, Airco sold and shipped its products in interstate commerce and engaged in "commerce" within the meaning of the Clayton Act and the Federal Trade Commission Act.

VIII

The Acquisition

22. On or about July 25, 1973, BOC and Airco entered into an agreement pursuant to which they agreed to exchange confidential data regarding their respective businesses. The agreement also provided that neither company would make any offer for a period of five years to acquire any securities of the other without the prior approval of the other company's board of directors. On or about December 10, 1973, BOC and Airco entered into a further agreement in which Airco approved a tender offer by BOC for three to four million of Airco's common shares. The agreement also provided for reciprocal representation by BOC and Airco on each other's board of directors. On or about December 10, 1973, BOC Financial made a tender offer on behalf of BOC to purchase three to four million common shares of Airco. BOC Financial subsequently accepted four million of the Airco's common shares which were tendered to it.

IX

Trade and Commerce

23. The value of industry shipments of industrial gas in the United States was approximately $700 million in 1972. Very high levels of concentration have prevailed in the industrial gas industry the last two decades. The four and eight largest firms during the year 1972 accounted for more than 70 percent and 90 percent respectively of the total industry shipment of industrial gases. Airco, the second largest producer, had sales of over $120 million in 1972. Entry barriers into the industrial gas industry are high. During the period from 1958 to date, several acquisitions were made in the industry, and the number of significant full-line producers diminished considerably. During the period from 1950 to 1972, sales of industrial gas more than tripled. The only significant entrant within the last ten years was the largest of the few large international industrial gas corporations.

24. Sales of inhalation anesthetic equipment in the United States were over $25 million in 1972. The four and eight largest firms during the year 1972 accounted for more than 70 percent and 85 percent respectively of total sales. Airco was the largest producer with over 35 percent of the United States market. BOC, through its United States subsidiaries, Fraser Sweatman and Harris Lake, was the third largest producer with over 8 percent of the market. The barriers to entry are high. The number of significant manufacturers with a substantial line of equipment has diminished considerably over the past ten years. BOC, through its recent acquisitions of Fraser Sweatman and Harris Lake, is the only significant recent entry.

25. Sales of inhalation therapy equipment were over $75 million in 1972. The four and eight leading firms accounted for over 50 percent and 65 percent respectively of sales. Airco was the second largest factor in the market in 1972. BOC was an actual competitor through sales of its Harris Lake subsidiary. Barriers to entry in the industry are high. The number of significant manufacturers with a substantial line of equipment has diminished considerably in the last ten years. Airco sales in this market were approximately $10.5 million.

26. Sales of medical pipeline systems in the United States were approximately $13.5 million in 1972. There were only five companies in the market. Airco is the leading company in the market with 51.5 percent of national sales. Entry barriers into the industry are high. The number of significant manufacturers with a substantial line of equipment has diminished considerably over the past ten years. There has been no recent significant new entrant.

X

Effects of the Acquisition

27. The effect of the acquisition of Airco stock by BOC may be substantially to lessen competition or to tend to create a monopoly in the manufacture, distribution or sale of industrial gases, inhalation anesthetic equipment, inhalation therapy equipment and medical gas pipeline systems or any submarkets of the above markets throughout the United States, or sections thereof, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. Sec. 18); and the effect of the agreements by which Airco and BOC undertook to eliminate the potential and actual competition between BOC and Airco may be to unreasonably restrain trade, and to hinder or have a dangerous tendency to hinder competition unduly, thereby constituting an unfair act and practice in commerce, in violation of Section 5 of the Federal Trade Commission Act, (15 U.S.C Sec. 45). These effects may occur in the following among other ways:

(a) Substantial potential competition through internal expansion or toehold acquisition, and substantial actual competition between BOC and Airco may be eliminated;

(b) The restraining influence of BOC as an actual or potential competitor may be eliminated;

(c) The competitive benefits of internal expansion and innovation by BOC may be eliminated;.

(d) Already high barriers to entry of new competition may be heightened and increased;

(e) Members of the purchasing public and the ultimate consumer may be denied the benefits of free and open competition;

(f) BOC, a leading international competitor in electrical welding equipment, and gas welding and cutting equipment may be eliminated as a

potential entrant into the concentrated United States electrical welding and gas welding and cutting markets by virtue of the acquisition of a large industrial gas company with presently existing substantial lines of electrical welding and gas welding and cutting equipment;

(g) Substantial competition between BOC and other companies for sale of products to Airco may be eliminated;

(h) Airco, a leading competitor may become further enhanced;

(i) Competitors of Airco may become competitively disadvantaged; and

(j) The effect of the stock acquisition may be to entrench or increase already high levels of concentration by encouraging tendencies for combination and merger by actual and potential competitors.

XI

Violations

28. The acquisition of four million shares of Airco stock by BOC and appertaining agreements between Airco and BOC, as alleged above, constitute violations of Section 7 of the Clayton Act, as amended (15 U.S.C. Sec. 18) and Section 5 of the Federal Trade Commission Act (15 U.S.C. Sec. 45).

WHEREFORE, THE PREMISES CONSIDERED, The Federal Trade Commission on this 26th day of February, A.D., 1974, issues its complaint against the British Oxygen Company, Ltd., BOC Financial Corporation, BOC Holdings, Ltd., British Oxygen Investments, Ltd., and Airco, Inc., respondents herein.

NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the 17th day of April A.D. 1974, at 10 a.m. o'clock is hereby fixed as the time and Federal Trade Commission Offices, 1101 Building, 11th & Pennsylvania Avenue., N. W., Washington, D. C. 20580 as the place when and where a hearing will be had before an administrative law judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the administrative law judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the administrative law judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

The following is the form of Order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint:

ORDER

I

IT IS ORDERED that respondent, British Oxygen Company, Limited (BOC) and its officers, directors, agents, representatives and employees shall within six months from the date this Order becomes final, divest itself absolutely and in good faith subject to the prior approval of the Federal Trade Commission of all rights, title and interest including without limitation all shares of stock and all assets, properties, rights and privileges, tangible, and intangible including without limitation all plant, equipment, machinery, raw material reserves, inventory, customer lists, trade names, trademarks, good will, and other property of whatever description acquired by BOC as a result of its acquisition of the stock of Airco, Inc.

II

IT IS FURTHER ORDERED that, pursuant to the requirement of Paragraph I above, none of the stock, assets, rights, or privileges, tangible or intangible, acquired or added by BOC shall be divested directly or indirectly to anyone who is, at the time of the divestiture, an officer, director, employee, or agent of, or under the control, direction or influence of BOC or who owns or controls more than one percent of the capital stock of BOC.

III

IT IS FURTHER ORDERED that respondent, BOC shall cease and desist for ten years from the date this Order becomes final from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital or assets (other than products sold in the normal course of business) of any concern, corporate or noncorporate, engaged at the time of acquisition in any state of the United States in any or all of the business of industrial gases, inhalation therapy equipment, inhalation anesthetic equipment, and medical pipeline systems without the prior approval of the Federal Trade Commission.

The prohibited acquisitions in this paragraph shall include but not be limited to the entering into of any arrangement between BOC, and any concern engaged in the business of industrial gases, inhalation therapy equipment, inhalation anesthetic equipment, medical pipeline systems or any segment thereof, pursuant to which BOC obtains the market share of any such concern (a) through such concern discontinuing its participation in the industries mentioned in this paragraph, or any segment thereof, under its own trade name or labels and thereafter manufacturing or distributing any of said products under the BOC trade name, or (b) by reasons of such concern discontinuing its participation in the industries mentioned in this paragraph or any segment thereof, and thereafter transferring to BOC its customer lists, or in any other way making available to BOC access to its customers or its customer accounts.

IV

IT IS FURTHER ORDERED that BOC notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any change in the corporation which may affect compliance obligations arising out of the Order.

V

IT IS FURTHER ORDERED that BOC shall within sixty(60) days after date of service of this Order, and every sixty (60) days thereafter until respondent BOC has fully complied with the provisions of this Order, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which respondent BOC intends to comply or has complied with this Order. All compliance reports shall include, among other things that are from time to time required, a summary of contracts or negotiations with anyone for the specified stock, assets and plant, the identity of all such persons, and copies of all written communications to and from such persons.

VI

For the purposes of this Order, BOC shall be read to include all subsidiary or related corporations and all successor corporations; and Airco shall be read to include all subsidiary or related corporations and all successor corporations.

VII

IT IS FURTHER ORDERED that respondent, Airco, Inc. (Airco), cease and desist from taking any steps toward achieving union of interest between Airco and BOC, including by way of merger, acquisition, consolidation or joint venture in any market referenced herein.

VIII

IT IS FURTHER ORDERED that respondent, Airco, cease and desist from taking any steps to implement any provision of the agreements between Airco and BOC of July 25, 1973, and of December 10, 1973.

IX

IT IS FURTHER ORDERED that respondent, Airco, cease and desist from taking any steps to nominate, seat, or admit any representative of BOC to the board of directors of Airco.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this Complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this 26th day of February, A.D., 1974.

By the Commission.

Chas. A. Tobin

SEAL

Charles A. Tobin,
Secretary.

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED.	DOCKET NO. 8955

ANSWER OF RESPONDENT
AIRCO, INC.

Respondent Airco, Inc. ("Airco"), by its attorneys, for its answer to the complaint:

1. Admits that the terms defined in paragraph 1 thereof are purported to be used in the complaint as defined and states that such use does not agree with accepted business and industrial terminology.

2. Admits the allegations of paragraph 2 thereof.

3. Admits the allegations of paragraph 3 thereof.

4. Denies the allegations of paragraph 4 thereof.

5. States that it is without knowledge of the allegations of paragraph 5 thereof.

6. Denies the allegations of the first sentence of paragraph 6 thereof except that two companies believed to be wholly-owned subsidiaries of British Oxygen Company, Limited, ("BOC") sell a very small amount of certain equipment useful in connection with the administration of gas as an anesthetic similar to such equipment sold by Airco, that the total amount of sales of such equipment in the United States as a whole is very small and that such wholly-owned subsidiaries are not a significant factor in any line of commerce in which Airco is engaged and states that it is without knowledge of the allegations of the second sentence of paragraph 6 thereof.

7. Denies the allegations of paragraph 7 thereof.

8. States that it is without knowledge of the allegations of the first sentence of paragraph 8 thereof and denies the allegations of the second sentence of paragraph 8 thereof except that a company believed to be a wholly-owned subsidiary of BOC sold to customers located in the United States a very small amount of certain types of equipment useful in the administration of inhalation therapy.

9. States that it is without knowledge of the allegations of paragraph 9 thereof.

10. States that it is without knowledge of the allegations of paragraph 10 thereof.

11. Denies the allegations of paragraph 11 thereof except that certain very insubstantial companies believed to be wholly-owned subsidiaries of BOC did sell and ship products in interstate commerce in the United States.

12. Admits the allegations of paragraph 12 thereof.

13. Admits the allegations of paragraph 13 thereof.

14. Admits the allegations of paragraph 14 thereof.

15. States that the term defined in paragraph 15 thereof has been defined differently in the introductory paragraph of the Complaint and therefore denies the allegations of paragraph 15 thereof.

16. Admits the allegations of paragraph 16 thereof.

17. Admits the allegation of paragraph 17 thereof except states that the terms purporting to indicate names of groups of products do not conform with the usual terminology of the trade and business and except that it denies the allegations of the last two sentences of paragraph 17 thereof.

18. Denies the allegations of the first sentence of paragraph 18 thereof except that Airco's operations involving inhalation anesthetic equipment, inhalation therapy equipment and medical pipeline equipment as defined in the Complaint are conducted through the Ohio Medical Products Division and denies the allegations of the second sentence of paragraph 18 thereof except as stated in paragraph 6 hereof.

19. Denies the allegations of paragraph 19 thereof except that Airco through its Ohio Medical Products Division manufactures and sells certain equipment useful in the administration of gas for anesthetic purposes and that it believes it sells more of such equipment than any other company in the United States.

20. Denies the allegations of paragraph 20 thereof except that through its Ohio Medical Products Division Airco sells inhalation therapy equipment and medical pipeline systems.

21. Admits the allegations of paragraph 21 thereof.

22. Denies the allegations of paragraph 22 thereof except that BOC and Airco entered into an agreement dated July 25, 1973, as amended on December 10, 1973, for the terms of which it refers thereto and that BOC Financial Corporation made a tender offer to purchase shares of common stock of Airco and did in fact purchase 4,000,000 such shares.

23. Denies the allegations of paragraph 23 thereof except that it is extremely costly, very risky and without short term profitability for any company not now a producer of any type or industrial gas within the United States to undertake such production on a substantial scale for sale within the United States.

24. Denies the allegations of paragraph 24 thereof except that equipment useful in the administration of gas for anesthetic purposes was sold in 1972, that such sales probably exceeded $25,000,000, that there were sales of such equipment by two United States companies believed to be wholly-owned subsidiaries of BOC and that Airco sold such equipment.

25. Denies the allegations of paragraph 25 thereof except that equipment useful in the administration of gas for therapeutic purposes was sold in 1972 in the United States, that the sales volume of such equipment of varying types probably approximated as much as $75,000,000 and that Airco sold such equipment.

26. Denies the allegations of paragraph 26 thereof except that equipment useful in medical pipeline systems was sold in 1972 in the United States and that such sales probably totaled as much as $13.5 million and that Airco sold such equipment.

27. Denies the allegations of paragraph 27 thereof.

28. Denies the allegations of paragraph 28 thereof.

FOR A FIRST AFFIRMATIVE DEFENSE, AIRCO ALLEGES

29. Airco has not directly or indirectly acquired the whole or any part of the stock or other share capital or the assets of any other corporation mentioned in the Complaint.

30. The Complaint fails to state a claim against Airco upon which relief can be granted.

FOR A SECOND AFFIRMATIVE DEFENSE, AIRCO ALLEGES

31. BOC, or any of its subsidiaries, does not manufacture, produce, transport, sell or offer for sale any industrial gases or medical pipeline systems to any customer within the United States.

32. BOC has never threatened, and has never been regarded as likely to manufacture, produce, transport, sell or offer for sale any industrial gases or medical pipeline systems to any customer within the United States.

33. BOC is not a potential competitor in any line of commerce in the United States that includes any industrial gases or medical pipeline systems.

FOR A THIRD AFFIRMATIVE DEFENSE,
AIRCO ALLEGES

34. Sales by BOC or any of its subsidiaries in the United States of any products or equipment also sold by Airco are very insubstantial. Any competition between BOC or its subsidiaries and Airco is not substantial. Discontinuance for any reason of any such direct competition will not tend substantially to lessen competition in any line of commerce or any market in the United States.

FOR A FOURTH AFFIRMATIVE DEFENSE,
AIRCO ALLEGES

35. The ownership by BOC or its subsidiaries of 35% of the common stock of Airco does not constitute control or working control over Airco or Airco's activities.

FOR A FIFTH AFFIRMATIVE DEFENSE,
AIRCO ALLEGES

36. The agreement between BOC and Airco dated July 25, 1973, as amended on December 10, 1973, is an agreement to protect the confidentiality of information of the parties, to prevent one from acquiring stock of the other without consent and to grant Airco a right of first refusal should BOC or one of its subsidiaries decide to sell any of its Airco stock. The agreement as amended

does not have any unfair or adverse effect on competition in any market or line of commerce in the United States.

37. Such agreement is not of a type which might be in violation of Section 5 of the Federal Trade Commission Act.

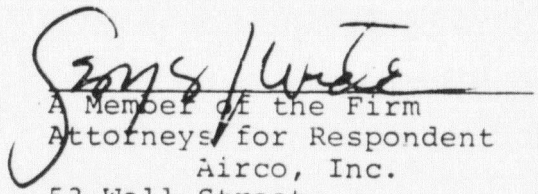
38. The complaint fails to state a claim upon which relief can be granted under Section 5 of the Federal Trade Commission Act.

WHEREFORE, Respondent Airco, Inc. prays that the complaint herein be denied as to it, without prejudice.

Dated: New York, N.Y.
March , 1974.

Respectfully submitted,

SHEARMAN & STERLING



A Member of the Firm
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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED.	Docket No. 8955

MOTION OF BOC RESPONDENTS
FOR A SUBPOENA DUCES TECUM

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Of Counsel

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED.	Docket No. 8955

TO: HONORABLE ERNEST G. BARNES
Administrative Law Judge

MOTION OF BOC RESPONDENTS
FOR A SUBPOENA DUCES TECUM

Respondents The British Oxygen Company Limited ("BOC"), BOC Financial Corporation, BOC Holdings, Limited and British Oxygen Investments, Limited (collectively the "BOC Respondents") hereby move, pursuant to §§ 3.33, 3.34 and 3.36 of the Procedures and Rules of Practice of the Commission, for issuance of a subpoena duces tecum requiring production by the Commission of documents relevant to this matter and necessary to the preparation of respondents' case.*

* The application, while technically one for a deposition and a subpoena duces tecum, is made for the purpose of pretrial discovery of documents in the hands of the Commission. Accordingly, in the event this application is granted, we will accept pretrial production of the documents sought and the Commission's representation that it has produced all documents described by the specifications to the subpoena in lieu of the deposition.

Preliminary Statement

In this proceeding, the Commission charges that BOC's acquisition of 35% of the stock of Airco violates Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. In particular, the Commission's complaint asserts that the effect of the acquisition may be substantially to lessen competition or to tend to create a monopoly in four alleged lines of commerce:

1. Industrial gases.
2. Inhalation anesthetic equipment.
3. Inhalation therapy equipment.
4. Medical pipeline systems.

Since April 1973, long before this acquisition, the FTC has been conducting an investigation of the industrial gases industry.* Among other things, it sent a request for the production of documents and for access to files to about seven companies in the business. (A copy of the request is Exhibit A to the proposed subpoena which appears at the end of this motion.) Moreover, after BOC's offer to purchase shares of Airco was announced, the Commission conducted an investigation of this acquisition. It served subpoenas duces tecum

*See affidavit of FTC staff economist Robert O. Reck, ¶ 2, FTC Exh. H in support of its application for a temporary restraining order and preliminary injunction in FTC v. BOC, Ltd., et al., civil action no. 74-31 (D. Del. 1974).

on the President of BOC Financial Corporation and others.

The purpose of this application is to obtain a subpoena duces tecum requiring the Commission to produce two categories of documents:

1. Documents obtained by the Commission pursuant to a few of the many specifications of its request for documents as part of the industrial gases industry investigation.

2. Documentsobtained from parties other than BOC and Airco which are responsive to certain of the specifications contained in the Commission's subpoena served on BOC Financial Corporation.

Thus, we are asking the Commission only for documents of the same kind which the Commission has already obtained from BOC, Airco and companies in the United States industrial gases business, and we seek far less than the Commission itself requested. Moreover, the general relevancy of the documents we seek and the reasonableness of the request cannot be questioned, as we are seeking only that which complaint counsel have already determined is relevant and are seeking far less than complaint counsel have deemed reasonable.

Respondents' Need for These Documents

BOC needs the documents requested here, and it needs them from the Commission.

First, trial in this action has been set for April 22, 1974. It is simply not feasible as a practical matter to obtain this information from other sources in the limited time remaining, even if it were available.

Second, BOC has only minimal ability to gather the information sought here for itself. As the Commission concedes, BOC is not engaged in the industrial gases business in the United States. Consequently, BOC has only limited familiarity with the alleged United States industrial gases market. Further, it can hardly be expected that companies producing industrial gases in the United States, several of which submitted affidavits in support of the Commission's motion for a preliminary injunction, would voluntarily cooperate with an effort by BOC to duplicate in little more than four weeks a study which has taken eleven months to date.

Third, the limitations of time make it impossible to attempt to duplicate the Commission's efforts by the taking of depositions.

Hence, as a practical matter, BOC must obtain the information sought here -- information bearing on such critical issues as sales and market shares in the alleged markets, barriers to entry, the existence of potential competitors, and the like -- from the Commission, or not at all.

Full Disclosure Should be Required

A full, fair and efficient litigation of the issues presented by the Commission's complaint would best be achieved by a full disclosure of all relevant evidence in advance of trial. Hickman v. Taylor, 329 U.S. 495, 507 (1947). It is too late in the day for proceedings before this Commission to be trials by ambush. Moreover, the Administrative Procedure Act requires the issuance of subpoenas at the request of the party to a proceeding "on a statement or showing of general relevance and reasonable scope of the evidence sought."* And Professor Davis has said: "Probably no sound reason can be given for failure to extend to administrative adjudications and discovery procedures worked out for judicial processings." 1 K. Davis, Administrative Law Treatise § 8.15, p. 589 (1958).

The need for discovery here goes beyond considerations of orderly procedure. During the year it has been investigating the industrial gas industry in the United States

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* 5 U.S.C. § 555(d). The Commission, moreover, is subject to subpoena to the same extent as a private party. 5 U.S.C. § 559.

and during the three months it has been investigating BOC's tender offer for stock of Airco, the Commission has doubtless gathered a considerable amount of information. To the extent that any of this information is adverse to the Commission's position in this proceeding, respondents have a constitutional right to obtain this information. See Brady v. Maryland, 373 U.S. 83 (1963).

Further
~~Finally~~, a denial of pretrial discovery in this case would be particularly arbitrary and unfair. Two agencies of the United States Government are authorized to challenge acquisitions and mergers which are believed to be in violation of Section 7 of the Clayton Act -- the Department of Justice and the Federal Trade Commission. Had BOC's acquisition of Airco been challenged by the Department of Justice, the litigation would have taken place in a United States District Court where BOC would have been entitled to full and complete discovery of the Government's case. The fortuitous circumstance that this acquisition has been attacked by the Federal Trade Commission rather than the Department of Justice provides no proper basis for denial of discovery. Indeed, in these circumstances, the denial of discovery in this case would be a denial of due process and equal protection of the law. See Bolling v. Sharpe, 347 U.S. 497 (1953); Communist Party of

the United States v. Subversive Activities Control Board, 254 F.2d 314 (D.C. Cir. 1958); Avnet, Inc., CCH Trade Reg. Rep. ¶ 19, 282 (FTC 1970); cf. Sloan v. New York Stock Exchange, Inc., Docket No. 73-1140 (2d Cir. Dec. 11, 1973).

Finally, there is no reasonable basis for denying respondents access to these materials. Complaint counsel had access to the documents and have made no secret of their use of these materials in preparing the Commission's case. Further, to the extent that the information sought includes confidential information supplied by third parties, respondents are willing to consent to any reasonable protective order. Moreover, respondents have met with complaint counsel in an effort to obtain voluntary cooperation from the Commission. That effort failed.

The FTC's New Spirit of Disclosure

In a recent speech before the National Press Club in Washington, D. C., Hon. Lewis A. Engman, Chairman of the Commission, announced a new disclosure policy. Chairman Engman said that in the future the Commission will make public the existence of industry-wide investigations. BNA Antitrust & Trade Regulations Reporter, No. 652, p. A-1 (Feb. 26, 1974). BOC Respondents submit that in keeping with the spirit of the new policy announced by Commissioner Engman, disclosure concerning the Commission's study of the industrial gas industry as well as the other disclosure requested should be made.

Conclusion

For all the foregoing reasons, BOC Respondents' petition for a subpoena duces tecum should be granted.

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By _____
Jay H. Topkis

Attorneys for Respondents
The British Oxygen Company Ltd.,
BOC Financial Corporation,
BOC Holdings, Ltd., and
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212-935-8000

Jay H. Topkis
Lewis A. Kaplan
Moses Silverman

Of Counsel

Dated: New York, New York
March 19, 1974

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SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA

Federal Trade Commission

TO: Secretary, Federal Trade Commission

The Honorable Charles A. Tobin

You are hereby required to appear before the Honorable Ernest G. Barnes, an Administrative Law Judge of the Federal Trade Commission, at Room , Federal Trade Commission, Sixth Street and Pennsylvania Avenue, N.W., Washington, D.C., on the 1st day of April, 1974, at 10 A.M. to depose at the instance of British Oxygen Company, Limited, BOC Financial Corporation, BOC Holdings, Limited and British Oxygen Investments, Limited, Respondents in Docket No. 8955, and you are hereby required to bring with you and produce at said time and place the books, papers and documents described in the specifications attached hereto.

Fail not at your peril.

In testimony whereof, the undersigned, an Administrative Law Judge of the Federal Trade Commission, has hereunto set his hand and the said Federal Trade Commission has caused its seal to be affixed at Washington, D.C., this day of March, 1974.

Administrative Law Judge

SPECIFICATIONS

1. Each document produced by any company during the Commission's investigation of the industrial gas industry pursuant to items 1 through 5, 9, 13, 14, 16 through 18, 24, 32 and 33 of the Commission's requests for the production of documents in that investigation, a sample of which is attached hereto as Exhibit A.

2. Each document obtained by the Commission during the course of its investigation of the industrial gas industry pursuant to items 1 through 3, 6 through 8, 10, 11, and 14 through 16 of the Commission's request for access to files appearing at pages 6 and following of Exhibit A hereto.

As part of its investigation of industrial gases and of the BOC-Airco transaction, the Commission served a subpoena duces tecum, dated December 13, 1973, on Adrian W. DeWind, President and Director of BOC Financial Corporation. The purpose of specifications 3 and 4 hereof is to obtain documents in the Commission's possession that are responsive to parts of that subpoena and were obtained from sources other than BOC and Airco.

3. Each document responsive to specification 1 of the subpoena duces tecum served by the Commission on Adrian

W. DeWind, President and Director, BOC Financial Corporation, on December 13, 1973.

4. Each document which refers to, analyzes, compares, comments on, sets forth, or relates to the following:

(a) Entry by any person or organization into the production, distribution and sale in the United States of industrial gases, as that term is used in the complaint, or

(b) Entry or change in the market shares of any person or organization in the production, distribution and sale in the United States of "inhalation ~~and~~ anesthetic equipment," "inhalation therapy equipment," or "medical pipline systems," as those terms are used ir the complaint.

5. A list of all people, including the residence and business addresses of each, with whom any Commission representative communicated concerning:

(a) An offer of BOC Financial Corporation, dated December 10, 1973, to purchase 3,000,000 common shares of Airco, Inc., or

(b) Actual or potential competition in the manufacture or production of, or trade or commerce in, "industrial

gases," "inhalation anesthetic equipment," "inhalation therapy equipment," or "medical pipeline systems," as those terms are used in the complaint.

* * *

This subpoena shall not be construed to require the production by the Commission of (a) any documents which the Commission obtained from either BOC or Airco or (b) any complaints by distributors of industrial gases concerning the manufacturers of industrial gases.

Richard V. Giordano, President,
Airco, Inc.,
85 Chestnut Ridge Road,
Montvale, New Jersey 07645

Re: File No. 741 0005.

Dear Mr. Giordano:

The Federal Trade Commission is conducting an investigation of trade practices in the industrial gas industry. As a leading member of the industry, your company's cooperation with this endeavor is very much desired. Accordingly, you are requested to provide the following information on or before 30 days from receipt of this letter:

1. A statement indicating the function, location, and capacity, in terms of cubic feet, of plants producing industrial gas owned by your company during the years, fiscal or calendar, 1967 to date. State all costs required to construct these plants (original and replacement).

2. A statement indicating actual production of each gas, in terms of cubic feet and dollars, of plants owned by your company during the years, fiscal or calendar, 1967 to date.

3. A statement of total net sales of each industrial gas for each of the years, fiscal or calendar, 1967 to 1972.

4. A statement indicating total net sales to direct industrial accounts, in terms of cubic feet and dollars, of each type of industrial gas, for each of the years, fiscal or calendar, 1967 to 1972.

5. A statement indicating total net sales to distributors, in terms of cubic feet and dollars, of each type of industrial gas, for each of the years, fiscal or calendar, 1967 to 1972.

BEST COPY AVAILABLE

EXHIBIT A

6. Documents which reflect for the period from 1967 to 1972 the net price paid per 100 cubic feet purchased by each industrial account buying industrial gas directly from your company in liquid form, and whose average monthly purchase was 100,000 cubic feet or more of any single gas. Your response should reflect all types of gas purchased by these accounts, in terms of cubic feet and dollars, transportation rates and all other debits and credits to the account.

7. Documents which indicate the net price per 100 cubic feet paid for each type of gas by each of your ten largest distributors during each of the years, fiscal or calendar, 1967 to 1972. Your response should reflect transportation rates and all debits and credits for each account.

8. All documents reflecting each instance of subsidization, credits or other allowances provided to any and each of the company's ten largest distributors during the period 1967 to 1972. All instructions, applications, and other forms pertaining thereto should be submitted. The meaning of all notations on invoices should be made clear.

9. Copies of all price schedules which reflect the price (and effective dates) which direct industrial accounts and distributors paid for industrial gas (and related transportation and facilities) sold by your company during the period 1967 to 1972. If a trade announcement preceded or accompanied distribution of any price schedule, submit a copy of that trade announcement.

10. Copies of all contracts used by your company for the purpose of selling industrial gas to direct accounts and distributors during the period 1967 to 1972. Copies of each contract with direct industrial accounts who purchased industrial gas by pipeline in any and each of the years from 1967 to 1972 should be included. Your response should also include the price charged to each direct pipeline account for each of the years 1967 to 1972.

11. A statement indicating the firm which constructed each pipeline used by your company to supply direct industrial accounts. This statement should reflect who owned the pipeline when first completed, and who presently owns the pipeline.

12. A statement indicating costs, per 100 cubic feet of gas, of each type of gas for each plant for each of the years, fiscal or calendar, from 1967 to 1972. All costs included should be specified. Any assumption or "pegging" (i.e. assignment of costs) should be stated with the reason attached therefor.

13. A copy of each exchange agreement your company had with any and each other producer of industrial gas during the period 1967 to date. Submit copies of exchange agreements with each producer. Narrative statements should describe each oral agreement.

14. A statement indicating, in terms of cubic feet and dollars, the amount of each type of industrial gas exchanged with each producer of industrial gas, pursuant to an exchange agreement for each of the years, fiscal or calendar, 1967 to 1972. This statement should reflect annual totals and all balancing transactions which occurred.

15. A statement indicating the names and last known addresses of direct industrial accounts and distributors whose contracts were cancelled. This statement should reflect which party cancelled the contract and the reason therefor.

16. A statement indicating those industrial gas accounts obtained, while under contract with another producer of industrial gas, by your company during the period 1967 to date. Submit a copy of all contracts between your company and those accounts obtained.

17. A statement indicating the types of facilities or equipment manufactured by your company used in the production of industrial gas. This statement should reflect the annual sales for each type of such equipment for each of the years, fiscal or calendar, 1967 to 1972.

18. A statement indicating the name and last known address of each firm that made a request for bids to purchase equipment manufactured by your company used for the production of industrial gas during the period 1967 to 1972. This statement should also reflect those firms which in fact purchased manufacturing equipment and those firms to whom no bids were made.

Richard V. Giordano, President.

19. A statement indicating the names of all companies that manufacture or distribute industrial gas and/or equipment used in the production of industrial gas in which your company owns or controls 5% or more either of any class of company's capital stock or of its assets. This statement should reflect the amount and type of all stock and/or assets and the date of acquisition. The type and age of the facilities should be specified.

20. A statement indicating the terms of all attempts or offers, including informal offers, made by your company to acquire stock or manufacturing facilities from a producer or distributor of industrial gas during the period 1960 to date.

21. A statement indicating accounts serviced directly by your company which were initially serviced through one of your distributors during the period 1967 to 1972. This statement should reflect the reasons for changing the manner of service.

22. A statement indicating those distributors who according to any contract presently in force at the time of sale, were required to purchase or lease cylinders and/or welding supplies from you in order to obtain a supply of industrial gas from your company during the period 1967 to 1972.

23. A statement of the company's policy with respect to the construction of acetylene plants by its distributors and sale of acetylene by them directly to industrial accounts. Any and all instances in which distributors have sold acetylene from their own plants directly to these accounts should be given.

24. A statement indicating unconsolidated rates of return for each type of gas for each of the years, calendar or fiscal, 1967 to date. This statement should reflect rates of return based on net annual sales, stockholder's equity and assets related to the production and sale of industrial gas.

25. A statement indicating total advertising expenditures made by your company for the sale of industrial gas and welding supplies for each of the years, 1967 to 1972. That portion designed exclusively to promote the sale of industrial gas by distributors should be specified.

Richard V. Giordano, President.

26. A statement indicating the record retention policy of your company. If each division or department has its own policy, submit a statement indicating the policy of that particular division or department in addition to any company policy.

27. A statement indicating the names, last known addresses and telephone numbers of officers who terminated their employment with your company or were terminated by your company during the period 1967 to date. This statement should reflect the reason for termination.

28. A statement listing all training facilities for distributors. Indicate costs of operation and maintenance. Specify costs devoted to the training of distributors in the distribution of gas.

29. A statement of man-days of distributors and employees of distributors in attendance at such training facilities. Specify the number of man-days or percentage of the total devoted to training distributors in distribution of gas.

30. An itemized statement of all costs of technical assistance to distributors. Specify the costs devoted to the distribution of gas.

31. Copies of all documents provided by your company to distributors relating to the distribution, pricing and sale of industrial gas products during the period 1965 to date.

32. A copy of each report submitted to the U.S. Department of Commerce, Bureau of Domestic Commerce, Chemicals, Petroleum, and Rubber Division as required under Section 705 of the Defense Production Act of 1950, as amended, relating to air separated product, air compression and liquifaction capacity, production, production capacity, and storage capacity; additional production capacity at each establishment; annual production workdays; change in name of company operating each plant, and remarks from 1967 to date.

33. A copy of each report submitted to the U.S. Department of Commerce, Bureau of Census, relating to SIC number 2813, for each of the years, fiscal or calendar, 1967 to date.

Richard V. Giordano, President.

34. A complete organizational chart which reflects the position held, the name of the party holding the position, the party's business address and phone number.

If the information requested in questions 1 thru 34 is not maintained by your company in the form requested, indicate the form in which the information is maintained.

The Commission also requests access to certain files of your company for the purpose of examination and to arrange for the copying of particular documents if necessary. Specifically, access is requested to all files containing memoranda, studies, policy guidelines, directives, minutes, and internal correspondence pertaining to:

1. Activities and policies of your company relating to the production and marketing of industrial gas.

2. The production and marketing actions of other (including potential) producers and distributors of industrial gas products.

3. Marketing actions of your company relating to other producers of industrial gas and/or their distributors.

4. Actions of your company relating to distributors of industrial gas products produced by your company.

5. The company's activities as a member of each and all trade associations relating to the production and sale of industrial gas products.

6. Analysis of national or regional markets in the industrial gas industry.

7. Reports or information provided to and/or received from each and all extra company production or marketing research organization.

8. Plans for expanding or reducing the company's production and/or distribution of industrial gas products.

9. Salesmen's call reports relating to customers for each of your company's ten largest distributors.

10. Construction of pipelines to distribute industrial gas products.

11. Tendering bids, by your company and other producers of industrial gas products, to customers purchasing industrial gas products by pipeline.

12. Allocating and budgeting advertising expenditures for the sale of industrial gas products and welding supplies.

13. Allocation and budgeting of itemized costs on a unit basis for each type of industrial gas products.

14. Return on investment, stockholders equity, and net sales for each industrial gas product.

15. Construction of each plant producing industrial gas products.

16. Acquisitions and/or joint ventures relating to the production, distribution, and sale of industrial gas products.

17. Legal action, actual or proposed, by or against your company relating to the production, distribution, and sale of industrial gas products.

18. Cancellation of your direct industrial accounts and distributors of industrial gas products.

It is requested that you forward the above information to the Bureau of Competition as it is compiled rather than in a complete submission at one time. In order to arrange

A convenient time for our staff to examine the specified files, it is requested that you contact the undersigned (202) 963-7215 or my associate Donald E. Purcell (202) 963-7207 within ten (10) days of receipt of this letter.

We look forward to your cooperation in the public interest.

Sincerely,

Gordon Youngwood,
Attorney,
Bureau of Competition.

[Registered Mail Return Receipt Requested]

BC/GYoungwood/mad.

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED.	Docket No. 8955

SUPPLEMENT TO
MOTION OF BOC RESPONDENTS
FOR A SUBPOENA DUCES TECUM

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British Oxygen Investments, Ltd.
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New York, New York 10022
212-935-8000

Jay H. Topkis
Lewis A. Kaplan
Moses Silverman

Of Counsel

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED.	Docket No. 8955

TO: HONORABLE ERNEST G. BARNES
Administrative Law Judge

SUPPLEMENT TO
MOTION OF BOC RESPONDENTS
FOR A SUBPOENA DUCES TECUM

Specification 2 attached to BOC Respondents' proposed subpoena duces tecum refers to a subpoena duces tecum dated December 13, 1973, which was served by the Commission on Adrian W. DeWind, President and Director of BOC Financial Corporation. A copy of that subpoena is annexed hereto.

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By _____
Lewis A. Kaplan

Attorneys for Respondents
The British Oxygen Company Ltd.,
BOC Financial Corporation,
BOC Holdings, Ltd., and
British Oxygen Investments, Ltd.
345 Park Avenue
New York, New York 10022
212-935-8000

Jay H. Topkis
Lewis A. Kaplan
Moses Silverman
Of Counsel

Dated: New York, New York
March 20, 1974

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F.T.C. 70-A

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

To Adrian W. DeWind,
President and Director,
BOC Financial Corporation, 345 Park Avenue,
New York, New York 10022

You are hereby required to appear before Donald E. Purcell,
an Attorney and Examiner of
the Federal Trade Commission, at Room 785,
6th & Pennsylvania Avenue, N.W.
in the City of Washington, D.C.
on the 18th day of December, 19 73, at 9:00 a. m.,
to testify at the instance of the Federal Trade Commission
in the matter File No. 741 0005.

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents:

(See attached Specifications)

Fail not at your peril.

In testimony whereof, the undersigned, an authorized official ~~her~~ of the Federal Trade Commission, has hereunto set his hand and caused the seal of said Federal Trade Commission to be affixed at Washington, D. C., this 13th day of December, 19 73

Robert E. Lindquist

Assistant Director ~~Commissioner~~

NOTICE TO WITNESS.—If claim is made for witness fee or mileage, this subpoena should accompany voucher.

INSTRUCTIONS

For the purpose of complying with the attached specifications, the term "British Oxygen Company, Ltd." (BOC) includes the corporation to which this subpoena is directed and its parents and domestic subsidiaries, affiliates , divisions and operating management, purchasing and sales units or organizational entities and the predecessors of any of them.

Whenever used, the word "or" is inclusive, asking for all materials which meet the description of any one or more of the disjoined words or phrases. "Documents" shall mean originals or any copies or written, recorded, transcribed, or graphic matter of every type and description, however and by whomever prepared, produced, reproduced, disseminated or made, including letters, telegrams, memoranda, reports, studies, minutes, pamphlets, notes, charts, maps, plats, tabulations, manuals, guides, outlines, abstracts, histories, and agendas and minutes or records of meetings, conferences, and telephone or other conversations or communications, all court pleadings, briefs, and decisions in which BOC was, or is, a party, all settlement agreements, in the possession, custody or control of the company, or any of its officers, directors, employees or agents. The term "Documents" also includes copies of documents which are not identical duplicates of the originals and copies of the documents of which

the originals are not in the possession, custody or control of the company. The term "Documents" further includes all tapes, discs, and punch cards used in data processing, together with the documentation necessary to use and understand such tapes, discs, and punch cards.

Each document submitted shall be clearly and precisely identified as to the specification or specifications to which it is responsive. Copies of original documents shall be legible in their entirety.

Unless otherwise stated, all references to year refer to calendar year. However, if calendar year information is unavailable, fiscal or other appropriate year data may be submitted with an indication as to the applicable 12-month period covered.

SPECIFICATIONS

1. Documents which refer, analyze, compare, comment on, set forth or relate to any of the following:

(a) all agreements between Airco, Inc. and British Oxygen Company, Limited;

(b) prospective cooperation between Airco, Inc. and British Oxygen Company, Limited;

(c) the offer of BOC Financial Corporation dated December 10, 1973, to purchase 3,000,000 common shares of Airco, Inc.;

(d) negotiations, meetings, communications, correspondence or memoranda between British Oxygen Company, Limited and Airco, Inc. relating to acquisition by British Oxygen Company, Limited of stock or assets of Airco, Inc.;

(e) the offer of December 3, 1973, of Curtiss-Wright Corporation to purchase common shares of Airco, Inc.; and

(f) the interest of any other company or concern in acquiring stock or assets of Airco, Inc.

2. Documents which indicate the number of shares of stock of Airco, Inc. held at any time by British Oxygen Company, Limited prior to December 10, 1973.

3. Documents which indicate the interest held by British Oxygen Company, Limited at any time in Airco, Inc., excluding ownership of common shares.

4. Documents submitted, presented, or made available to any bank, financial institution or other concern for the purpose of or with respect to financing the purchase by BOC Financial Corporation of 3,000,000 common shares of Airco, Inc.

5. Documents which indicate the interest in British Oxygen Company, Limited held at any time by Airco, Inc.

6. Documents which refer, analyze, compare, comment on, set forth or relate to the following:

(a) entry by British Oxygen Company, Limited into the production, distribution and sale of industrial gases in the United States;

(b) entry or increase in the market shares of British Oxygen Company, Limited in production, distribution, and sale in the United States of products other than industrial gases.

7. Documents which indicate the total annual sales and the market shares in the United States of British Oxygen Company, Limited in production, distribution and sale of products, equipment and services for the period 1965 to date.

8. Documents which indicate the total annual sales and the market shares in the United States of Airco, Inc. in production, distribution and sale of products, equipment and services for the period 1965 to date.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED.	DOCKET NO. 8955

To: The Honorable Ernest G. Barnes,
Administrative Law Judge.

COMPLAINT COUNSEL'S OPPOSITION
TO BOC RESPONDENTS' MOTION
FOR SUBPOENA DUCES TECUM

On March 19, 1974, British Oxygen Company, Limited (BOC) and other BOC respondents filed a motion pursuant to Section 3.36 of the Commission's Rules of Practice for issuance of a subpoena duces tecum requiring production of documents by the Federal Trade Commission. As discussed below, BOC respondents' motion does not comply with the explicit requirements for issuance of a subpoena under Section 3.36 of the Commission's Rules and should be denied in its entirety.

Section 3.36(b) of the Commission's Rules expressly requires that a motion for issuance of a subpoena for production of documents in the records of the Commission (1) shall

specify as exactly as possible the material to be produced, (2) shall establish the general relevancy of the requested material, (3) shall establish the reasonableness of the scope of the application, and (4) shall show that the requested documents are not available from other sources by voluntary methods or by compulsory process. The motion of BOC respondents is glaringly deficient with respect to each and every one of the requirements of Section 3.36(b). Indeed BOC respondents have made no more than a pretense of complying with these requirements.

It should be noted at the outset that with respect to the disclosure of complaint counsel's case, the subpoena request of BOC respondents is completely superfluous. By March 28, 1974, fifteen days after the first prehearing conference in this proceeding, complaint counsel will have fully disclosed its case to all respondents both with respect to prospective witnesses and trial exhibits. Complaint counsel have, in fact, already revealed their prospective trial exhibits to respondents. Moreover, in the event that subsequent pretrial developments mandate any additions or modifications with respect to complaint counsel's prospective witnesses or trial exhibits, complaint counsel at the earliest possible time will make such additions or modifications known to respondents.

The documents which the Federal Trade Commission would be required to produce under the specifications of BOC respondents' requested subpoena can be summarized as follows:

Specification 1 would require production of all documents submitted by any company to the Commission pursuant to 14 items contained in voluntary requests for information which requests were employed by the Commission staff in the course of its ongoing investigation of the industrial gas industry;

Specification 2 would require the production of all documents obtained by the Commission staff pursuant to 10 items contained in voluntary requests for access to company files which requests were employed by the Commission staff in the course of its ongoing investigation of the industrial gas industry;

Specification 3 would require production of all documents which the Commission obtained from sources other than from any respondent which documents are responsive to specification 1 of the subpoena duces tecum served by the Commission upon the President of respondent BOC Financial Corporation on December 13, 1973;

Specification 4 would require all documents which refer, analyze, compare, comment on, set forth, or relate (a) to entry by any person or organization into the U.S. industrial gas industry or (b) entry or change in market shares of any

person or organization with respect to the following markets in the United States: inhalation anesthetic equipment, inhalation therapy equipment, or medical pipeline systems;

Specification 5 is not a request for production of documents but rather an interrogatory requesting information and would require that the Commission provide a list of all persons including their resident and business addresses whom any Commission representative contacted concerning (a) the offer of respondent BOC Financial Corporation dated December 10, 1973, to purchase 3 million common shares of respondent Airco, Inc., or (b) actual or potential competition in the following markets in the United States: industrial gases, inhalation anesthetic equipment, inhalation therapy equipment, or medical pipeline systems.

With the exception of Specification 5 which is an interrogatory, each specification of the requested subpoena of BOC respondents either parallels or incorporates specifications contained in either prior Commission voluntary requests or in a prior Commission subpoena duces tecum. Apparently, BOC respondents assumed that by so tailoring their specifications, they would render their specifications immune from challenge on the grounds of specificity, relevancy, or reasonableness. BOC respondents, in fact, make the statement in their motion that "the general relevancy of the documents we seek

and the reasonableness of the request cannot be questioned, as we are seeking only that which complaint counsel have already determined is relevant and are seeking far less than complaint counsel have deemed reasonable." */

This ploy by BOC respondents simply will not work. The explicit requirements of specificity, relevancy, and reasonableness set forth in Section 3.36 of the Commission's Rules cannot be so easily circumvented.

The specifications contained in the voluntary requests for information and for access to company files that were employed by the Commission staff in the course of its ongoing investigation of the industrial gas industry were by necessity designed to be general and extensive. Specifications 1 and 2 of BOC respondents requested subpoena incorporates a total of 24 of the general and extensive specifications contained in those prior Commission voluntary requests. It necessarily follows that Specifications 1 and 2 of BOC respondents do not "specify as exactly as possible the material to be produced" as required by Section 3.36(b).

Specifications 3 and 4 of the requested subpoena of BOC respondents also fail to meet the specificity requirement of Section 3.36(b). These specifications incorporate or

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*/ Motion of BOC Respondents for a Subpoena Duces Tecum at 3.

parallel specifications contained in a Commission investigatory subpoena and both require production of "documents which refer, analyze, compare, comment on, set forth or relate to" certain matters, occurence,s, or events. Such broad, general descriptions of documents, while necessarily suitable for an investigatory subpoena, clearly lacks the exactness which the Commission has determined must exist in subpoena requests under Section 3.36. As emphasized by the Commission in Koppers Company, Inc., Docket No. 8755, Commission Opinion, July 2, 1968 (74 F.T.C. 1579):

> "Rule §3.36(b) . . . requires that respondent '. . . shall specify as exactly as possible the material to be produced . . .' (emphasis added). This is not to be interpreted to mean a particular identifiable document (the identity of which will frequently not be known to respondent), but it does require greater specificity than a general request for '. . . all documents of any nature, kind or description . . .' so that there can be no doubt exactly what materials must be furnished." 74 F.T.C. at 1584.

BOC respondents have similarly failed to establish the reasonableness of the scope of their Specifications 1 through 4 as required under Section 3.36(b). The specifications in the prior Commission voluntary requests and in the prior Commission's investigatory subpoena were as previously mentioned broad and extensive. The scope of the specifications in the Commission voluntary requests were particularly broad.

Those specifications were designed to be comprehensive, and accordingly embraced broad general categories of information. Such broad general requests, however, cannot be justified as reasonable under Section 3.36(b). BOC respondents' specifications which incorporate or mirror those broad, general requests are therefore defective. In Kopper Company, supra, the Commission made it abundantly clear that a request for materials, which "comprehensively embraces whole files or categories of documents . . . is unreasonable in scope and is not justified under the Commission's rules." 74 F.T.C. at 1584. Accord, Associated Merchandising Corporation, Docket No. 8651. Commission Opinion, December 11, 1967 (72 F.T.C. 1030).

The motion of BOC respondents also does not comply with the requirement of Section 3.36(b) that the general relevancy of the documents sought to be produced be established. The relevancy requirement of Section 3.36(b) has been interpreted by the Commission to require an applicant to set forth with precision the issues involved in litigation with respect to which its requested documents are relevant. Associated Merchandising Corporation, supra, 72 F.T.C. at 1033.

BOC respondents have made no showing of relevancy whatsoever. They merely assert in their motion that the

specifications of their requested subpoena are per se relevant because they seek only documents that the Commission staff determined were relevant with respect to the staff's investigation of the industrial gas industry. BOC respondents apparently fail to realize that documents relevant to the Commission staff's investigation may or may not be relevant to the issues involved in the present litigation. BOC respondents are required under Section 3.36(b) to establish the relevancy of their specifications to the issues involved in the trial of this case. They have not done so.

The most serious defect of BOC respondents' motion for issuance of a subpoena is their failure to show as required under Section 3.36(b) that the documents requested of the Commission are not available from other sources by voluntary methods or by compulsory process. The documents which BOC respondents have requested are contained in the investigatory files of the Commission and many of the documents are highly confidential. In fact, many of the documents sought by BOC respondents were submitted to the Commission's staff only after the Commission provided assurances to companies that the information they submitted would be kept confidential.

The sensitive nature of some of the documents BOC respondents would have the Commission produce is illustrated by the fact that Union Carbide Corporation has petitioned both

the Commission and your Honor to prevent the information it submitted to the Commission staff from being made available to respondents. At least two other companies have advised complaint counsel that they are concerned that confidential information they submitted to the Commission may be released as a result of this proceeding.

The documents requested by BOC respondents should not be released from the Commission's files without a compelling showing that BOC respondents need to obtain those documents from the Commission. It is well settled that sensitive information within the investigatory files of the Commission will not be released in an adjudicative proceeding without a strong showing of need.

> "Sensitive information of this nature should not be released by the Commission from its confidential files without compelling need. Disclosing information from the Commission's confidential files under a lesser standard would necessarily engender resistance on the part of companies and individuals cooperating in Commission industry investigations. It would be likely to seriously retard voluntary compliance with the Commission's efforts to obtain the data which it needs in industry inquiries. Obviously, the cooperation which the Commission has received in the past

> from business depends in large part on the confidence of industry that confidential data submitted to this Agency will not be released in an adjudicative proceeding unless specific and concrete need therefor has been shown." The Seeburg Corporation, Docket No. 8632, Commission Opinion, October 25, 1966 (70 F.T.C. 1809, 1813).

Similar holdings by the Commission are legion. See, e.g., The Crown Cork & Seal Company, Inc., Docket No. 8687, Commission Opinion, February 8, 1967 (71 F.T.C. 1634); The Sperry and Hutchinson Company, Docket No. 8671, Commission Opinion, April 15, 1966 (69 F.T.C. 1112).

BOC respondents have not made a compelling showing that they need to obtain the documents they request from the Commission. In fact, it is clear from their motion that BOC respondents have made no attempt whatsoever to obtain any of their requested documents from other sources by either voluntarily or compulsory means. BOC respondents filed their motion for issuance of a subpoena over three weeks after the complaint issued in this case. Yet there is no indication in their motion that during that period BOC respondents contacted even a single source for the purpose of obtaining any of the documents they would have the Commission produce.

In their motion BOC respondents make the incredulous assignment that "BOC has minimal ability to gather the information

sought" because "BOC has only limited familiarity with the alleged United States industrial gases market." */ This is a curious statement indeed considering that BOC was familiar enough with the U.S. industrial gas market to invest $80 million for the purpose of entering that market.

BOC respondents also assert that the companies producing industrial gas in the United States can hardly be expected to cooperate with BOC. BOC respondents have conveniently chosen to ignore the fact that Section 3.36(b) requires a showing that the requested documents are not available from other sources by compulsory process. As pointed out by the Commission in Crown Cork & Seal Company, supra, 71 F.T.C. at 1639. "We are not aware that friendliness and a spirit of cooperation is a necessary precondition to the effectiveness of compulsory process."

The Commission in Crown Cork & Seal also made it clear that a mere averment of need will not justify a demand for access to the Commission's confidential files. BOC respondents attempt to justify access to the Commission investigatory files in their motion on the basis of just that - a mere averment of need. Moreover, until BOC respondents have seriously

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*/ Motion of BOC Respondents for a Subpoena Duces Tecum, at 4.

attempted and have failed to obtain their requested documents from sources outside the Commission by both voluntary and compulsory means, they cannot in good faith make anything more than an empty averment of need.

It is important to note that except for the trial exhibits previously revealed to respondents, complaint counsel have no intention of using any of the documents contained in its investigatory files for any purpose at the trial of this case. In the event that subsequent pretrial developments require complaint counsel to rely on any of the documents in the Commission's investigatory files either for trial exhibits or as underlying data for trial exhibits, all such documents will be made available to all respondents at the earliest possible time.

As previously discussed, BOC respondents have failed to make any of the requisite showings under Section 3.36(b) with respect to Specifications 1 through 4 of their requested subpoena. Specification 5 of their requested subpoena as pointed out earlier, is not a request for production of documents but is rather an interrogatory. BOC respondents' motion asks only for the issuance of a subpoena duces tecum and does not seek issuance of interrogatories. Further, Specification 5 requests information which is simply not [illegible] and accordingly should be denied.

In accordance with Complaint Counsel's Proposed Pretrial Schedule, complaint counsel will submit to all respondents on March 28, 1974, a list showing the name, address, and business affiliation of persons intended to be called by complaint counsel as witnesses. There is simply no precedent, nor do BOC respondents offer any, for requiring complaint counsel additionally to provide the information requested by BOC respondents as to each and every person contacted during the Commission staff's investigation of the industrial gas industry.

The motion of BOC respondents is defective in every respect and should be denied in its entirety. The suggestion by BOC respondents in their motion that if this litigation were in a United States District Court they would be entitled to the documents they request is unfounded. Under the Federal Rules of Civil Procedure, respondents, in order to obtain documents from the government, would be required to specifically designate the particular documents sought and to show good cause why the documents should be produced. See, e.g., United States v. Becton, Dickinson and Co., (D.C.N.J.) 1962 Trade Cases ¶70,319. Accordingly, BOC respondents' motion would also be defective under the Federal Rules of Civil Procedure.

For the foregoing reasons, counsel in support of the complaint request that the motion of BOC respondents for issuance of a subpoena requiring production of documents by the Federal Trade Commission be denied in its entirety.

Respectfully submitted,

K Keith Thurman,
Gordon Youngwood,
Donald E. Purcell,
Daryl A. Nickel,
John R. Hoagland,
Counsel Supporting
the Complaint.

By: K Keith Thurman

Dated March 25, 1974

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SECRETARY

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED.	DOCKET NO. 8955

COMPLAINT COUNSEL'S INITIAL REQUEST FOR ADMISSION OF FACTS

Pursuant to Section 3.31 of the Commission's Rules of Practice, complaint counsel request respondents to admit the following:

1. On April 1, 1973, Airco */ had 94 physical plant locations.

2. On April 1, 1973, Airco had 134 sales offices and warehouses.

3. At the time of the acquisition of Airco stock by BOC, the Ohio Medical Products Division of Airco produced anesthetic agents and medical gases.

4. At the time of the acquisition of Airco stock by BOC, the Ohio Medical Products Division of Airco produced anesthetic apparatus and accessories, inhalation therapy equipment and accessories and medical pipeline systems equipment.

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*/ For purposes of this request, Airco shall include Airco, Inc., its subsidiaries and affiliates.

5. As of April 1, 1973, the Ohio Medical Products Division operated plants at Berkeley, California; Cleveland, Ohio; Fort Myers, Florida; Houston, Texas; Lodi, New Jersey; Madison, Wisconsin and Richmond, California.

6. On April 1, 1973, Charles H. Simpson was President of the Airco Industrial Gases Division.

7. At the time of the acquisition of Airco stock by BOC, Airco produced acetylene, carbon dioxide, carbon monoxide, argon, helium, hydrogen, nitrogen, oxygen, nitrous oxide, other medical gases, rare gases, and mixtures and combinations thereof.

8. At the time of the acquisition of Airco stock by BOC, Airco Industrial Gases Division operated plants at Albion, Michigan; Chester, West Virginia; Bethlehem, Pennsylvania; Buffalo, New York; Butler, Pennsylvania; City of Industry, California; Claymont, Delaware; East Alton, Illinois; Fairfield, Alabama; Huron, Ohio; Johnstown, Pennsylvania; New Orleans, Louisiana; Phoenix, Arizona; South Acton, Massachusetts; Vancouver, Washington; Warren, Ohio; Chicago, Illinois; Hopewell, Virginia; Kansas City, Kansas; Lawrence, Kansas; Pedricktown, New Jersey; Riverton, New Jersey; and Bound Brook, New Jersey.

9. At the time of the acquisition of Airco stock by BOC, the Airco Industrial Gases Division operated a gaseous hydrogen plant in the United States.

10. At the time of the acquisition of Airco stock by BOC, Airco's subsidiary, Airco Cryoplants Corp., was engaged in the design and construction of air separation, liquefied natural gas and other low temperature plants.

11. Airco is the largest distributor of helium in the United States.

12. On or about December 15, 1967, Allan Cornford, General Manager of the Medical Division of BOC */ contacted the Ohio Medical Products Division of Airco in Madison, Wisconsin, regarding possible distriubiton of products of the Ohio Medical Products Division by BOC.

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*/ For purposes of this request, BOC shall include British Oxygen Company Limited, its subsidiaries and affiliates.

13. On or about December 15, 1967, Allan Cornford of BOC's Medical Division discussed with R. D. Cosgrove, Vice President of Marketing of Ohio Medical Products, an agreement providing for an exchange of information between Ohio Medical Products Division and BOC with respect to nitrous oxide production.

14. On or about April 30, 1968, R. D. Cosgrove, Vice President of Marketing of Ohio Medical Products Division, contacted Allan Cornford, General Manager, Medical Division of BOC regarding possible distribution by BOC of Ohio Medical Products Division's products.

15. On or about December 15, 1967, Allan Cornford of BOC contacted R. D. Cosgrove of Ohio Medical Products Division regarding possible distribution in the United States by Ohio Medical Products Division of a small regulator manufactured by BOC.

16. In 1967, Allan Cornford of BOC contacted John Waters of Puritan regarding possible distribution of Entonox in the United States.

17. In 1973, Airco's Ohio Medical Products Division's sales represented approximately 42 percent of the total secondary medical pipeline systems equipment sales in the United States.

18. In 1973, the top two firms accounted for approximately 80% of total sales of secondary medical pipeline systems equipment in the United States.

19. Airco's Ohio Medical Products Division continued to hold its position as the leader in United States primary hospital pipeline systems equipment sales in 1972 and 1973.

20. BOC and Airco combined is the world's largest industrial gas producer.

21. In 1967, Airco acquired Galleher, Inc., as well as its manufacturing organization, Elastomers, Inc., which manufactured conductive rubber products, and merged both into the Ohio Medical Products Division.

22. In 1973, Airco operated its gas producing plants at more than 90 percent of capacity.

23. At the time of the acquisition of Airco stock by BOC, there were no more than five manufacturers of anesthetic gas machines in the United States.

24. At the time of the acquisition of Airco stock by BOC, there were no more than five manufacturers of medical pipeline systems in the United States.

25. Acetylene, carbon dioxide, carbon monoxide, argon, helium, hydrogen, nitrogen, oxygen, nitrous oxide, other medical gases, rare gases and mixtures and combinations thereof are the only gases included within Standard Industrial Classification 2813 of the United States Department of Commerce.

26. On or about December 11, 1973, William Moeller, communicated with Lee Hague of Dean Witter & Co., Inc., concerning the possible acquisition of OEM Medical, Inc. by BOC.

27. At the time of the acquisition of Airco stock by BOC, Harris-Lake, Inc. manufactured and sold inhalation anesthetic equipment in the United States.

28. At the time of the acquisition of Airco stock by BOC, Harris-Lake, Inc. manufactured and sold inhalation therapy equipment in the United States.

29. In 1973, Mr. A. I. Ray of BOC met with representatives of Oxequip Health Industries, Inc., regarding BOC's interest in acquiring control of Oxequip Health Industries, Inc.

30. Prior to A. I. Ray's visit to Oxequip Health Industries, Inc., Fraser Sweatman contacted Oxequip Health Industries, Inc. regarding BOC's interest in acquiring controlling stock of Oxequip Health Industries, Inc.

31. Prior to the acquisition of Airco stock by BOC, a certified accountant of a subsidiary of BOC visited Oxequip Health Industries, Inc. and conferred with Ernst & Ernst of Chicago for an accounting survey of the records of Oxequip Health Industries, Inc.

32. In 1972, BOC was the leading manufacturer of industrial gas in the United Kingdom.

33. In 1973, BOC was the leading manufacturer of industrial gas in the United Kingdom.

34. Prior to the acquisition of Airco stock by BOC, BOC acquired Fraser Sweatman, Inc., a United States company engaged in the manufacture and sale of inhalation anesthetic equipment in the United States.

35. Prior to the acquisition of Airco stock by BOC, Fraser Sweatman, Inc. competed with Airco's Ohio Medical Products Division in the sale of inhalation anesthetic equipment in the United States.

36. On or about October 15, 1973, Ray Dow of Canadian Oxygen Company, a subsidiary of BOC contacted Michael Loveman, President of Burdett Oxygen Co., Inc. (Cleveland), concerning possible acquisition of Burdett Oxygen Company (Cleveland) by BOC.

37. At the time of the acquisition of Airco stock by BOC, Airco was engaged in the manufacture and sale of inhalation anesthetic equipment in the United States through its Ohio Medical Products Division.

38. During 1973, Airco purchased inhalation anesthetic equipment from Fraser Sweatman, Inc. for sale in the United States.

39. In 1972, BOC was the leading producer of inhalation anesthetic equipment in the United Kingdom.

40. In 1973, BOC was the leading producer of inhalation anesthetic equipment in the United Kingdom.

41. At the time of the acquisition of Airco stock by BOC, BOC was one of the four largest suppliers of inhalation anesthetic equipment in the European Economic Community.

42. At the time of the acquisition of Airco stock by BOC, Airco was engaged in the manufacture of medical pipeline systems in the United States.

43. At the time of the acquisition of Airco stock by BOC, BOC was engaged in the manufacture of medical pipeline systems in the United Kingdom.

44. At the time of the acquisition of Airco stock by BOC, BOC was the leading producer of medical pipeline systems in the United Kingdom.

45. At the time of the acquisition of Airco stock by BOC, BOC was one of the four largest suppliers of medical pipeline systems in the European Economic Community.

46. At the time of the acquisition of Airco stock by BOC, BOC was the leading producer of inhalation therapy equipment in the United Kingdom.

47. At the time of the acquisition of Airco stock by BOC, BOC was one of the four largest suppliers of inhalation therapy equipment in the European Economic Community.

48. In 1972, BOC was the second largest producer of industrial gases in the world.

49. In January, 1970, J. M. Williams, Managing Director of BOC, met with representatives of Chemetron Corporation to discuss the possible acquisition by BOC of a controlling interest in Chemetron.

50. In 1971, J. M. Williams, Managing Director of BOC, met with C.D.L. Perkins of Burdett Oxygen Company (Norristown) and discussed the possible acquisition of Burdett Oxygen Company (Norristown).

51. In 1972, Fraser Sweatman, Inc. manufactured inhalation anesthetic equipment.

52. BOC's exports to the United States of Harlow medical equipment for the fiscal year ending in 1972 amounted to $230,000.

53. BOC's exports to the United States of Harlow medical equipment for the fiscal year ending in 1972 amounted to $284,000.

54. Net sales of Harris-Lake, Inc. in 1972 were $1,503,000.

55. The initials "CDLP" on proposed CX 115-B are those of C.D.L. Perkins of Burdett Oxygen Co.

56. In April 1968, Albert Mulier was employed as a consultant by BOC.

57. During the period from 1968 to 1970, Albert Muller contacted producers and distributors of industrial gases in the United States on behalf of BOC regarding possible acquisitions.

58. Sales of inhalation anesthetic equipment by Fraser Sweatman, Inc. in the United States for the fiscal year ending in 1972 were $2,145,484.

59. Sales of inhalation anesthetic equipment by Fraser Sweatman, Inc. in the United States for the fiscal year ending in 1973 were $2,498,146.

60. Sales of inhalation anesthetic equipment by Cyprane, Inc. in the United States for the fiscal year ending in 1972 were $258,499.

61. In 1973, BOC Holdings acquired all of the capital stock of Harris-Lake, Inc.

62. The initials "WCM" on proposed CX 107 are those of William C. Moeller.

63. The initials "PGB" on proposed CX 99-B are those of P.G. Bosonnet.

64. Pursuant to an agreement of July 25, 1973, BOC and Airco exchanged confidential information.

65. The initials "LES" on proposed CX 98-B are those of Leslie E. Smith.

66. The initials "PGB" on proposed CX 93-J are those of P.G. Bosonnet.

67. The initials "JMH" on proposed CX 96-F are those of J.M. Horner.

68. The initials "CWB" on proposed CX 91-B are those of C.W. Baird.

69. The initials "CABL" on proposed CX 88-A are those of C.A.B. Leslie.

70. The initials "JAP" on proposed CX 69 are those of J.A. Perham.

71. The initials "JMW" on proposed CX 74 are those of J.M. Williams.

72. The initials "LES" on proposed CX 78 are those of Leslie E. Smith.

73. The initials "LRD" on proposed CX 83 are those of L.R. Dingle.

74. During September 1968, J.A. Perham, President of Canox and Dr. A. Muller discussed with William Gardner of Gardner Cryogenics Corporation the acquisition of Gardner Cryogenics by BOC.

75. During 1968, Dr. A. Muller on behalf of BOC contacted the Clinton Oil Company of Wichita, Kansas.

76. During 1968, Dr. A. Muller discussed with Clinton Oil Company of Wichita, Kansas, the possibility of BOC's obtaining rights to any helium recovered by Clinton Oil.

77. During 1968, Will Ross Inc. of Milwaukee, Wisconsin was contacted by Dr. A. Muller on behalf of BOC with respect to the acquisition by BOC of Mathieson Special Gases Divisions in the United States and Canada.

78. During 1969 and 1970, Allan Perham had the responsibility for assessing industrial gases development opportunities in the United States for BOC.

79. During 1969, the Medical/Aviation Division of BOC, determined that acquisition of a United States company was essential to make a major impact in the United States medical markets of inhalation anesthetic and inhalation therapy equipment markets.

80. BOC considered acquisition of Airco as early as July 1969.

81. During 1969, information on United States hydrogen sales was assembled by Dr. Muller at the request of I. Greenfield of BOC.

82. The Ohio Medical Products Division of Airco was the second largest account of Fraser Sweatman, Inc. during the fiscal year ending in 1973.

83. During 1972, Harris-Lake, Inc. manufactured medical equipment for BOC in the United States.

84. During 1972, Harris-Lake, Inc. distributed medical equipment for BOC in the United States.

85. At the time of the acquisition of Airco stock by BOC, BOC produced the medical gas Entonox.

86. BOC has been producing the medical gas Entonox since at least 1965.

87. During 1967, BOC entered into a joint venture with Air Reduction Company, Inc. for the manufacture and sale of air and gas separation plants, which joint venture was terminated in 1971.

88. During 1968, the Airco-BOC joint venture obtained a contract from Big Three Industrial Gas and Equipment Company of Houston, Texas to build two large air separation plants.

89. During 1970, the Airco-BOC joint venture obtained contracts to construct tonnage oxygen plants for United States Steel.

90. BOC is among the largest producers of industrial gases in each of the countries in which they produce industrial gas.

91. It was recognized by BOC in 1973 that in order to successfully enter the United States medical equipment markets in which it was interested, BOC would require an investment of $20 to $30 million.

92. In 1968, BOC representatives communicated with at least one United States producer of industrial gases regarding possible acquisition.

93. In 1969, BOC representatives communicated with at least one United States producer of industrial gases regarding possible acquisition.

94. In 1970, BOC representatives communicated with at least one United States producer of industrial gases regarding possible acquisition.

95. In 1971, BOC representatives communicated with at least one United States producer of industrial gases regarding possible acquisition.

96. In 1972, BOC representatives communicated with at least one United States producer of industrial gases regarding possible acquisition.

97. In 1973, BOC representatives communicated with at least one United States producer of industrial gases regarding possible acquisition.

98. In 1968, Dr. A. Muller, or other BOC representatives communicated with at least one United States distributor of industrial gases regarding possible acquisition.

99. In 1969, Dr. A. Muller, or other BOC representatives communicated with at least one United States distributor of industrial gases regarding possible acquisition.

100. In 1970, Dr. A. Muller, or other BOC representatives communicated with at least one United States distributor of industrial gases regarding possible acquisition.

101. In 1971, BOC representatives communicated with at least one United States distributor of industrial gases regarding possible acquisition.

102. In 1972, BOC representatives communicated with at least one United States distributor of industrial gases regarding possible acquisition.

103. In 1973, BOC representatives communicated with at least one United States distributor of industrial gases regarding possible acquisition.

104. In 1972, BOC representatives communicated with at least one United States manufacturer of inhalation therapy equipment and accessories regarding possible acquisition by BOC.

105. In 1973, BOC representatives communicated with at least one United States manufacturer of inhalation therapy equipment and accessories regarding possible acquisition by BOC.

106. In 1972, BOC representatives communicated with at least one United States distributor of inhalation therapy equipment and accessories regarding possible acquisition by BOC.

107. In 1973, BOC representatives communicated with at least one United States distributor of inhalation therapy equipment and accessories regarding possible acquisition by BOC.

108. In 1972, BOC representatives communicated with at least one United States manufacturer of anesthetic equipment and accessories regarding possible acquisition by BOC.

109. In 1973, BOC representatives communicated with at least one United States manufacturer of anesthetic equipment and accessories regarding possible acquisitiion by BOC.

110. In 1972, BOC representatives communicated with at least one United States distributor of anesthetic equipment and accessories regarding possilbe acquisition by BOC.

111. In 1973, BOC representatives communicated with at least one United States distributor of anesthetic equipment and accessories regarding possible acquisition by BOC.

Respectfully submitted,

K Keith Thurman,
Gordon Youngwood,
Donald E. Purcell,
Daryl A. Nickel,
John R. Hoagland,
Counsel Supporting
the Complaint.

By: K Keith Thurman

Dated March 26, 1974

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED.	DOCKET NO. 8955

To: The Honorable Ernest G. Barnes,
Administrative Law Judge.

COMPLAINT COUNSEL'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO BOC RESPONDENTS' MOTION FOR SUBPOENA DUCES TECUM

Pursuant to Your Honor's instruction at the prehearing conference in this proceeding on March 28, 1974, counsel in support of the complaint submit this supplemental memorandum in opposition to BOC respondents' motion for issuance of a subpoena duces tecum requiring production of documents from the files of the Federal Trade Commission. This memorandum is submitted in response to (1) the oral presentation made at the prehearing conference by counsel for BOC respondents and (2) the question raised at the conference of whether copies in the Commission's files

of reports submitted by companies to the Census Bureau and to the Department of Commerce are subject to compulsory process.

As made clear in complaint counsel's initial opposition to BOC respondents' motion, BOC respondents' failed in every respect to comply with the express requirements for issuance of a subpoena under Section 3.36 of the Commission's Rules. At the prehearing conference, Your Honor permitted counsel for BOC respondents to attempt by an oral presentation to satisfy the provision of Section 3.36 which requires that the general relevancy of the requested documents be shown. Your Honor requested that complaint counsel submit this memorandum in lieu of responding at the prehearing conference to the oral presentation of BOC respondents' counsel.*/ As discussed later in this memorandum, the claims made by counsel for BOC respondents as to the relevancy of the documents requested from the Commission are largely unfounded.

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*/ Although it was contemplated by Your Honor that complaint counsel would have a transcript of the prehearing conference for the purpose of preparing this response, budgetary restraints dictated that complaint counsel forgo the additional expense of obtaining a transcript of that proceeding on an expedited basis.

Moreover, it is complaint counsel's position that BOC respondents are not entitled to production of any of the requested documents from the Commission without having first attempted to obtain those documents from other sources by voluntary and compulsory means as is explicitly required by Section 3.36. As emphasized by complaint counsel at the prehearing conference, complaint counsel do not have the authority to waive the requirements of Section 3.36. Those provisions were promulgated by the Commission to protect the confidentiality of information received from third parties. Any waiver or relaxation of those provisions could seriously jeopardize future efforts of the Commission to obtain data for industry investigations. Any decision to waive the requirements of Section 3.36 must, therefore, be made by the Commission.

Further, it is doubtful that the Commission under the circumstances present here would waive or relax the requirements of Section 3.36. BOC respondents are seeking production of documents from the Commission which the Commission staff obtained from four companies during its ongoing investigation of the industrial gas industry.

Those four companies are Union Carbide Corporation, Air Products and Chemicals Corporation, Chemetron Corporation, and Liquid Air Inc. The Commission staff also obtained information from respondent Airco pursuant to the voluntary requests for information and for access to company files that are incorporated in Specifications 1 and 2 of BOC respondents' requested subpoena. However, documents which the Commission's staff obtained from respondent Airco is not required by BOC respondents.

It is spurious for BOC respondents to maintain that because this proceeding is being expedited that time limitations made it impossible for them to attempt to obtain documents from these four companies by voluntary and compulsory means. Five weeks have now passed since the complaint issued in this case. BOC respondents long ago could have determined whether any of these four companies would voluntarily produce the requested documents. If the four companies had refused to produce the documents voluntarily, BOC respondents had more than enough time to seek issuance of

subpoenas. It is inexplicable why on March 19, 1974, BOC respondents, instead of requesting issuance of the subpoena directed at the Federal Trade Commission, did not seek issuance of subpoenas to whichever of the four companies, if any, was unwilling to provide documents voluntarily. BOC respondents simply chose to ignore the express requirements of Section 3.36.

Additionally, the Commission may find that BOC respondents' efforts toward expediting these proceedings are insincere. Your Honor issued a subpoena which required production of certain documents by BOC respondents and the appearance of BOC's Chairman or a suitable representative on March 28, 1974. Despite BOC respondents' repeated protestations that these proceedings be expedited, BOC respondents found it unnecessary to comply with that subpoena on time. When asked by Your Honor at the prehearing conference on March 28, 1974, if BOC had fulfilled its obligations under the subpoena, counsel for BOC respondents replied that they hoped to comply with the subpoena within several days.

This cavalier attitude of BOC respondents towards complying with the subpoena was particularly appalling to complaint counsel considering that complaint counsel within

15 days of the first prehearing conference in this proceeding had with no small effort fully disclosed its case to all respondents. It would appear unlikely that the Commission would waive the provisions of Section 3.36 of its Rules in favor of respondents who contumaciously disregard subpoenas issued under the auspices of the Federal Trade Commission.

It would also seem reasonable to assume that the Commission would find that BOC respondents' showing as to their need to obtain some of the documents they request from the Commission is less than compelling. The Commission has made it abundantly clear that "confidential data submitted to this Agency will not be released in an adjudicative proceeding unless specific and concrete need therefor has been shown." The Seeburg Corporation, Docket No. 8682, Commission Opinion, October 25, 1966 (70 F.T.C. 1809, 1813).

Counsel for BOC respondents readily admitted at the prehearing conference that BOC respondents requested many of the documents demanded from the Commission for the purpose of finding "some leads." He also indicated that BOC respondents realized that many of the requested

documents would be of no use to them but that there was always the chance that they could "get lucky" and that something favorable would turn up. Both the Commission and the federal courts have long held that a mere hope or suspicion of some favorable evidence is not a sufficient basis for obtaining confidential files from the Commission.

> "[S]ubpoenas are not issued on mere suspicion. They are not for extended fishing expeditions in waters of unknown productivity in the vague hope of 'catching the odd one.' "Coro, Inc. v. F.T.C., 338 F.2d 149, 153 (1st Cir. 1964), cert. denied, 380 U.S. 954 (1965).

Moreover, it is extremely unlikely that any of the documents obtained by the Commission staff pursuant to its voluntary requests from Union Carbide, Air Products and Chemicals, Chemetron, and Liquid Air would be of any use to BOC respondents in their defense in this proceeding. That information is largely fragmented and incomplete. As indicated in our initial opposition to BOC respondents' motion for a subpoena, complaint counsel have no present intention of using any of the documents submitted by those companies pursuant to the Commission staff's voluntary requests at the trial of this case.

It cannot be emphasized too strongly that the documents submitted by those four companies are considered by them

to be highly confidential. All four of the companies have expressed concern that respondents BOC and Airco, which are their potential and actual competitors, will be given access to documents they submitted to the Commission. As stated at the prehearing conference, one of the companies has indicated that it would not be satisfied even if access to its documents were limited to respondents' counsel because a partner in the firm representing respondent Airco is a member of the board of directors of Airco. Further, two of the four companies have informed complaint counsel that they are prepared to take whatever steps are necessary to assure that confidential documents submitted by them to the Commission staff are not released from the Commission investigatory files.

Complaint counsel submit that the foregoing reasons indicate beyond question that BOC respondents are not entitled to the confidential information they are requesting from Commission files. Additionally, the specifications of BOC respondents' proposed subpoena are also defective for the reasons set forth below.

Specification 1 would require production of all documents submitted to the Commission staff by Union Carbide, Air Products and Chemicals, Chemetron and Liquid Air pursuant

to the following 14 items of a voluntary request for information:

Items 1-3 relate respectively to function, capacity and cost of industrial gas plants; production of specific gases; and net sales of specific gases. Counsel for BOC respondents stated at the prehearing conference that capacity, production and sales information was relevant to the issue of market shares. Complaint counsel do not dispute that statement. However, we do point out that the information requested by BOC respondents pursuant to these three items was obtained from only four companies and is incomplete and fragmented. The information, therefore, will not be useful either in establishing the market shares of those particular companies or in establishing a universe.

It is also complaint counsel's position that BOC respondents have no need to know the capacities of specific plants of these four companies. Universe information as to the capacity of all industrial gas plants in the United States is publicly available from the U.S. Department of Commerce. Further, two of the four companies have informed complaint counsel that they are adamantly opposed to respondents BOC and Airco obtaining access to documents showing the capacities of their plants.

It is also difficult to understand why information as to the costs of constructing specific plants of four companies

is needed for BOC respondents' defense. BOC from 1967 to 1971 was engaged with Airco in a joint venture which constructed plants in the United States. Respondent BOC knows full well the cost of constructing industrial gas plants in the United States.

Complaint counsel stipulated at the prehearing conference that for purposes of the complaint, the relevant product market with respect to industrial gases was the entire industrial gas market and that complaint counsel would not attempt to establish industrial gas submarkets. Accordingly, there is no reason for BOC respondents to obtain information from four companies as to production and net sales of specific gases.

Items 4-5 relate respectively to net sales of specific gases to industrial accounts and to distributors. The information submitted pursuant to these items is completely irrelevant for purposes of this proceeding. Counsel for BOC respondents stated that this information would be relevant in the event that complaint counsel sought to establish separate submarkets for industrial gas sales to industrial accounts and to distributors. Complaint counsel have no such intention.

Item 9 relates to price schedules for industrial gas and would appear to be relevant.

Items 13-14 relate respectively to exchange agreements and to the amounts of specific gases exchanged. Counsel for BOC respondents stated that the question of whether such exchange agreements existed was relevant to this proceeding. He did not indicate that the specific agreements themselves or the amounts of specific gases exchanged pursuant to those agreements were relevant. Complaint counsel submit that they are not relevant.

Item 16 relates to customer lists. This information is extremely sensitive and it is inconceivable that it is relevant to this proceeding.

Item 17 relates to the manufacture of industrial gas production facilities and to the annual sales of such facilities. Industrial gas production facilities are not within any of the product markets relevant to this proceeding. Accordingly, the types of facilities manufacturered by the four companies, if any, and their annual sales of such facilities are not relevant.

Item 24 relates to rates of return for specific gases. Counsel for BOC respondents stated at the prehearing conference that BOC viewed the industrial gas industry in the United States as a "disaster area" and that the information submitted pursuant to Item 24 would indicate whether his client's view was correct. It is clear that respondent BOC's subjective

view of the U.S. industrial gas industry is relevant to this proceeding. However, it is equally clear that the actual rates of return realized by four companies is in no way probative of the subjective view or intent of respondent BOC. Further, rates of return for specific gases are not relevant as industrial gas submarkets are not pertinent. Accordingly, complaint counsel submit that there is no reason for BOC respondents to obtain the information submitted by the four companies pursuant to this item.

Item 32 requests copies of reports submitted to the U.S. Department of Commerce pursuant to Section 705 of the Defense Production Act of 1950, as amended (50 U.S.C. App. §2155). Those reports relate to production capacities of companies for specific gases. The question was raised at the pretrial conference of whether copies in the Commission's files of these reports are subject to compulsory process.

The provisions of 50 U.S.C. App. §2155 do not appear to exempt from compulsory process copies of the reports submitted to the Department of Commerce pursuant to the statute. Accordingly, the Commission would apparently not violate the statute by permitting BOC respondents to obtain access to the copies of the reports in its files. However, the statute does provide criminal penalties for disclosure of the information obtained by the Department of Commerce

pursuant to the statute. That criminal penalty provision is a clear indication that Item 32 involves extremely confidential information. Complaint counsel submit that adequate justification for permitting BOC respondents to obtain this information from the Commission's files has not been shown.

Item 33 requests copies of reports submitted to the Bureau of Census. The question was also raised at the prehearing conference of whether copies in the Commission's files of these reports are subject to compulsory process. The relevant provision of the Census Act is as follows:

> "No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding." 13 U.S.C. §9.

There is no question that under the statute, copies of census reports retained by companies are exempt from compulsory process. However, the statute does not indicate whether copies of those reports which were voluntarily submitted to the Commission are subject to legal process. Complaint counsel found no case law shedding any light on that question. However, it is complaint counsel's position that as the copies of the reports in the Commission's files

were submitted with the understanding that those reports would be kept confidential, for purposes of the statute, the companies concerned have retained control over the copies. The copies of the census reports in the Commission's files are therefore not subject to compulsory process.

In any event, it is clear that even if BOC respondents could obtain copies of those reports from the Commission's files, the statute would still prohibit them from using the copies for any purpose in this proceeding unless they obtained the consent of the companies concerned. It would make little sense, even if legally permissible, to permit BOC respondents to obtain copies of those reports from the Commission. If the companies concerned would consent to BOC respondents using the copies of their reports in this proceeding, it is not likely that those companies would refuse to provide copies of those reports to BOC respondents.

Specification 2 would require production of all documents obtained by the Commission staff from Union Carbide, Air Products and Chemicals, Chemetron, and Liquid Air pursuant to the following 11 items of a voluntary request for access to company files.

Item 1-3 relate to production and marketing activities and policies. These items would require the Commission to produce every memorandum, study, policy guideline, directive, minute, and internal correspondence obtained from the four

companies that pertain to production and marketing activities and policies. The extreme scope of these items flies in the face of the explicit requirement of Section 3.36 of the Commission's Rules that the scope of the requested subpoena be reasonable. At the prehearing conference, Your Honor, in fact, indicated to counsel for BOC respondents that the scope of these items was overly broad. BOC respondents' counsel conceded that the items were too broad but stated that his clients afterall were only interested in those documents which the Commission staff obtained pursuant to these items whatever those documents may be.

This artful defiance of the requirements of Section 3.36 by BOC respondents should not be sanctioned. It is preposterous for BOC respondents to seek a waiver of the Section 3.36 provision which requires initial exhaustion of third party sources and yet be completely unwilling to even attempt to specify the documents they would have the Commission produce. Moreover, complaint counsel submit that the relevancy of any materials obtained by the Commission staff pursuant to these three items is tenuous at best.

Item 6 relates to analyses of national and regional industrial gas markets. This item, like the preceding three items, is overly broad. BOC respondents should be required to specifically designate the type of market analyses they would have the Commission produce. Counsel for BOC respondents

stated at the prehearing conference that Item 6 may provide documents which will support the view of respondent BOC that the industrial gas industry in the United States is a "disaster area." As indicated earlier, the subjective view of respondent BOC of the U.S. industrial gas industry is relevant. However, the views of other companies of the U.S. industrial gas industry is simply not probative of the subjective opinions of respondent BOC.

Item 7 relates to extracompany production and marketing research. This item again is extremely broad and, moreover, any documents produced pursuant to it could only be remotely related to any issues in this case.

Item 8 relates to expansion and reduction of production and distribution of industrial gas. While some documents submitted pursuant to this item may be relevant to this case, the scope of the item is clearly unreasonable as presently drafted.

Items 10-11 relate respectively to industrial gas product pipelines and bids to customers purchasing gas products by pipelines. Industrial gas product pipelines are not within any product market relevant to this proceeding. These items are accordingly not relevant.

Item 14 relates to return on investment. This item is too broad and is also subject to the relevancy objections stated earlier with respect to Item 24 of Specification 1.

Item 15 relates to construction of industrial gas plants. This item is clearly too broad and is of little, if any, relevance.

Item 16 relates to acquisitions and joint ventures with respect to production, distribution, and sale of industrial gas products. While some of the documents submitted pursuant to this item may be relevant to this case, the scope of the item is unreasonably broad as presently drafted.

Specification 3 would require production of all documents which the Commission obtained from sources other than from any respondent which documents are responsive to Specification 1 of the subpoena duces tecum served by the Commission upon the President of respondent BOC Financial Corporation on December 13, 1973. Complaint counsel has determined that either BOC respondents or respondent Airco have copies of all documents in the Commission's files that are responsive to this specification. This specification is therefore moot.

Specification 4 would require all documents which refer, analyze, compare, comment on, set forth, or relate to certain matters, occurences, or events. While some of the documents submitted pursuant to this specification may be relevant to this case, the scope of the specification is unreasonably broad as presently drafted.

Specification 5 would require that the Commission compile a list of certain persons, including their resident and business addresses, whom any Commission representative

contacted during the Commission staff's ongoing investigation in the industrial gas industry. This information is simply not discoverable. It is not discoverable under the Commission's Rules nor would it be discoverable under the Federal Rules of Civil Procedure.

For the reasons set forth above and the reasons previously set forth in complaint counsel's initial opposition to BOC respondents' motion, complaint counsel request that BOC respondents' motion for issuance of a subpoena duces tecum requiring production of documents from the files of the Federal Trade Commission be denied in its entirety.

Respectfully submitted,

K Keith Thurman,
Gordon Youngwood,
Donald E. Purcell,
Daryl A. Nickel,
John R. Hoagland,
Counsel Supporting
the Complaint.

By: Daryl A. Nickel

Dated: April 1, 1974

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED.	DOCKET NO. 8955

AIRCO'S RESPONSE TO COMPLAINT COUNSEL'S INITIAL REQUEST FOR ADMISSION OF FACTS

Airco, Inc. ("Airco") responds to Complaint Counsel's Initial Request for Admission of Facts for the purposes of this proceeding only and not as an admission by Airco for any other purpose. This response is made without in any way waiving or intending to waive, but on the contrary intending to preserve and preserving:

(a) All questions as to the competency, relevancy, materiality, privilege and admissibility as evidence for any purpose of these answers, or the subject matter thereof, in any subsequent proceeding in, or the trial of, this or any other matter;

(b) The right to object to the use of any of

these answers, or the subject matter thereof, in any subsequent proceedings in, or the trial of, this or any other matter on any ground;

(c) The right to object on any ground at any time to a demand for further response to this or any other request for admission of facts or other discovery procedures involving or relating to the subject matter of the request herein answered; and

(d) The right at any time to revise, correct, add to, or clarify any of the answers herein.

REQUEST

1. On April 1, 1973, Airco had 94 physical plant locations.

ANSWER

1. Denied, except admitted that on April 1, 1973, Airco had 95 physical plant locations.

REQUEST

2. On April 1, 1973, Airco had 134 sales offices and warehouses.

ANSWER

2. Admitted.

REQUEST

3. At the time of the acquisition of Airco stock by BOC, the Ohio Medical Products Division of Airco produced anesthetic agents and medical gases.

ANSWER

3. Denied, except admitted that at the time of the acquisition of Airco stock by BOC, the Ohio Medical Products Division of Airco produced Ethrane, Fluoromar, nitrous oxide and cyclopropane.

REQUEST

4. At the time of the acquisition of Airco stock by BOC, the Ohio Medical Products Division of Airco produced anesthetic apparatus and accessories, inhalation therapy equipment and accessories and medical pipeline systems equipment.

ANSWER

4. Denied, except admitted that at the time of the acquisition of Airco stock by BOC, the Ohio Medical Products Division of Airco sold the products listed in its catalog previously supplied to complaint counsel on April 2, 1974 and produced certain of them.

REQUEST

5. As of April 1, 1973,the Ohio Medical Products Division operated plants at Berkeley, California; Cleveland, Ohio; Fort Myers, Florida; Houston, Texas; Lodi, New Jersey; Madison, Wisconsin and Richmond, California.

ANSWER

5. Denied, except admitted that as of April 1, 1973, the Ohio Medical Products Division operated plants at Berkeley, California; Cleveland, Ohio; Fort Myers, Florida; Houston, Texas; Madison, Wisconsin and Richmond, California.

REQUEST

6. On April 1, 1973, Charles H. Simpson was President of the Airco Industrial Gases Division.

ANSWER

6. Admitted.

REQUEST

7. At the time of the acquisition of Airco stock by BOC, Airco produced acetylene, carbon dioxide, carbon monoxide, argon, helium, hydrogen, nitrogen, oxygen, nitrous oxide, other medical gases, rare gases, and mixtures and combinations thereof.

ANSWER

7. Denied, except admitted that at the time of the acquisition of Airco stock by BOC, Airco produced acetylene, argon, nitrogen, oxygen, nitrous oxide, medical gases, rare gases and mixtures and combinations of gases and purified carbon dioxide and hydrogen.

REQUEST

8. At the time of the acquisition of Airco stock by BOC, Airco Industrial Gases Division operated plants at Albion, Michigan; Chester, West Virginia; Bethlehem, Pennsylvania; Buffalo, New York; Butler, Pennsylvania; City of Industry, California; Claymont, Delaware; East Alton, Illinois; Fairfield, Alabama; Huron, Ohio; Johnstown, Pennsylvania; New Orleans, Louisiana; Phoenix, Arizona; South Acton, Massachusetts; Vancouver, Washington; Warren, Ohio; Chicago, Illinois; Hopewell, Virginia; Kansas City, Kansas; Lawrence, Kansas; Pedricktown, New Jersey; Riverton, New Jersey; and Bound Brook, New Jersey.

ANSWER

8. Denied, except admitted that at the time of the acquisition of Airco stock by BOC, Airco Industrial Gases Division operated plants at Albion, Michigan; Chester, West Virginia; Bethlehem, Pennsylvania; Buffalo, New York; Butler, Pennsylvania; City of Industry, California; Claymont, Delaware; East Alton, Illinois; Fairfield, Alabama; Johnstown, Pennsylvania; New Orleans, Louisiana; Phoenix, Arizona; South Acton, Massachusetts; Vancouver, Washington; Warren, Ohio; Hopewell, Virgnia; Lawrence, Kansas; Pedricktown, New Jersey; Riverton, New Jersey; Decatur, Alabama; and Richmond, California.

REQUEST

9. At the time of the acquisition of Airco stock by BOC, the Airco Industrial Gases Division operated a gaseous hydrogen plant in the United States.

ANSWER

9. Admitted.

REQUEST

10. At the time of the acquisition of Airco stock by BOC, Airco's subsidiary, Airco Cryoplants Corp., was engaged in the design and construction of air separation, liquefied natural gas and other low temperature plants.

ANSWER

10. Admitted, except denied that Airco or Airco Cryoplants Corp. designs or constructs all components of such plants.

REQUEST

11. Airco is the largest distributor of helium in the United States.

ANSWER

11. Denied, except admitted that during 1973 Airco sold approximately $6,000,000 of helium in the United States.

REQUEST

12. On or about December 15, 1967, Allan Cornford, General Manager of the Medical Division of BOC contacted the Ohio Medical Products Division of Airco in Madison, Wisconsin, regarding possible distribution of products of the Ohio Medical Products Division by BOC.

ANSWER

12. Denied, except admitted that on or about December 15, 1967, Allan Cornford, General Manager of the Medical Division of BOC, visited the Ohio Medical Products Division of Airco in Madison, Wisconsin to discuss the possible distribution of Ohio products by BOC distributors in Africa, the Middle East and Asia.

REQUEST

13. On or about December 15, 1967, Allan Cornford of BOC's Medical Division discussed with R. D. Cosgrove, Vice President of Marketing of Ohio Medical Products, an agreement providing for an exchange of information between

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED.	Docket No. 8955

BOC'S RESPONSE TO COMPLAINT
COUNSEL'S INITIAL REQUEST FOR
ADMISSION OF FACTS

Pursuant to Section 3.31 of the Commission's Rules of Practice, BOC Respondents respond to complaint counsel's initial request for admission of facts for the purpose of this proceeding only and not as admission by them for any other purpose. This response is made without waiving or intending to waive, but on the contrary preserving and intending to preserve:

(a) All questions as to the competency, relevancy, materiality, privilege and admissibility as evidence for any purpose of these answers, or the subject matter thereof, in any subsequent proceeding in, or the trial of, this or any other matter;

(b) The right to object to the use of any of these answers, or the subject matter thereof, in any subsequent proceedings in, or the trial of, this or any other matter on any ground;

(c) The right to object on any ground at any time to a demand for further response to this or any other request for admission of facts or other discovery procedures involving or relating to the subject matter of the request herein answered; and

(d) The right at any time to revise, correct, add to, or clarify any of the answers herein.

ANSWERS

1. Denied, except admitted that on April 1, 1973, Airco had 95 physical plant locations.

2. Admitted.

3. Denied, except admitted that at time of the acquisition of Airco stock by BOC, the Ohio Medical Products Division of Airco ("Ohio") produced Ethrane, Fluoromar, nitrous oxide and cyclopropane.

4. Denied, except admitted that at the time of the acquisition of Airco stock by BOC, Ohio sold the products listed in its catalog, previously supplied to complaint counsel on April 2, 1974, and produced certain of them.

5. Denied, except admitted that as of April 1, 1973, Ohio operated plants at Berkeley, California; Cleveland, Ohio; Fort Myers, Florida; Houston, Texas; Madison, Wisconsin and Richmond, California.

6. Admitted.

7. Denied, except admitted that at the time of the acquisition of Airco stock by BOC, Airco produced acetylene, argon, nitrogen, oxygen, nitrous oxide, medical gases, rare gases, mixtures and combinations of gases, and purified carbon dioxide and hydrogen.

8. Denied, except admitted that at the time of the acquisition of Airco stock by BOC, Airco Industrial Gases Division operated plants at Albion, Michigan; Chester, West Virginia; Bethlehem, Pennsylvania; Buffalo, New York; Butler, Pennsylvania; City of Industry, California; Claymont, Delaware; East Alton, Illinois; Fairfield, Alabama; Johnstown, Pennsylvania; New Orleans, Louisiana; Phoenix, Arizona; South Acton, Massachusetts; Vancouver, Washington; Warren, Ohio; Hopewell, Virginia; Lawrence, Kansas; Pedricktown, New Jersey; Riverton, New Jersey; Decatur, Alabama; and Richmond, California.

9. Admitted.

10. Admitted, except denied that Airco or Airco Cryoplants Corp. was engaged in the design or construction of all components of such plants.

11. Denied, except admitted that during 1973 Airco sold approximately $6 million of helium in the United States.

12. Denied, except admitted that on or about December 15, 1967, Allan Cornford, General Manager of the Medical Division of BOC visited Ohio in Madison, Wisconsin to discuss the possible distribution of Ohio products by BOC distributors in Africa, the Middle East and Asia.

13. Denied, except admitted that in or about 1967 and/or 1968 Ohio and BOC exchanged information relating to nitrous oxide production.

14. Denied, except admitted that on or before April 30, 1968, R. D. Cosgrove, Vice President of Marketing for Ohio and Allan Cornford, General Manager, Medical Division of BOC had inconclusive discussions regarding BOC distributors that might be of interest to Ohio as outlets for Ohio products in Africa, the Middle East and Asia.

15. Denied, except admitted that in or about 1967 or 1968, Ohio asked BOC for quotes on various quantities of a small regulator but no purchases were made.

16. Denied, except admitted that in or about 1967, BOC offered to license its process for the production of Entonox to numerous companies including Puritan Compressed Gas Corp. and communicated with John Waters with respect thereto.

17. Denied, except admitted that in 1973 Ohio's sales of medical pipeline systems and related equipment in the United States were $7,930,503.

18. Denied.

19. Denied, except admitted that Ohio's sales in the United States of medical pipeline systems and related equipment were $7,930,503 in 1973 and were $6,433,934 in 1972.

20. Objected to on the grounds that the meaning of the term "largest" is not clear in the context in which it is used and that the request is for an irrelevant and immaterial admission.

21. Denied, except admitted that in 1967, Airco acquired the assets of Galleher, Inc., and of its manufacturing organization, Elastomers, Inc., which manufactured conductive rubber products. The assets acquired were used by Ohio.

22. Denied.

23. Denied.

24. Denied.

25. Denied, except admitted that acetylene, carbon dioxide, argon, helium, hydrogen, nitrogen, neon, oxygen, nitrous oxide and "gases, industrial: compressed, liquified, or solid -

mlpm" are the only gases within Standard Industrial Classification 2813 of the United States Department of Commerce, Bureau of the Census. Standard Industrial Classification 2813 also includes solid carbon dioxide.

26. Denied, except admitted that on or about December 11, 1973, Lee Hague of Dean Witter & Co., Inc., contacted William Moeller concerning possible acquisition of OEM Medical, Inc. by BOC.

27. Denied, except admitted that at the time of the acquisition of Airco stock by BOC, Harris-Lake, Inc. manufactured and sold one or more types of inhalation anesthetic equipment as that term is defined in paragraph 1(b) of the complaint.

28. Denied, except admitted that at the time of the acquisition of Airco stock by BOC, Harris-Lake, Inc. sold in the United States one or more types of equipment which complaint counsel or others may consider to be inhalation therapy equipment as that term is defined in paragraph 1(c) of the complaint.

29. Denied, except admitted that Mr. A.I.Ray of BOC met with one or more representatives of Oxequip Health Industries, Inc. ("Oxequip") in 1973.

30. Denied, except admitted that prior to A.I. Ray's meeting with Oxequip, Oxequip communicated with Mr. Fraser

Sweatman with respect to Oxequip's desire to sell its business to BOC.

31. Denied, except admitted that prior to the acquisition of Airco stock by BOC, an accountant employed or engaged by BOC or a subsidiary thereof examined accounting records of Oxequip prepared by or obtained from or through Ernst & Ernst.

32. Admitted.

33. Admitted.

34. Denied, except admitted that prior to the acquisition of Airco stock by BOC, BOC acquired Cyprane, Ltd., a United Kingdom corporation of which Fraser Sweatman, Inc., a United States corporation, was a subsidiary and that Fraser Sweatman, Inc. manufactures and sells in the United States one or more types of inhalation anesthetic equipment, as that term is defined in paragraph 1(a) of the complaint.

35. Denied.

36. Denied, except admitted that on or about October 15, 1973, Ray Dow of Canadian Oxygen Co., a subsidiary of BOC, met with Michael Loveman, President of Burdett Oxygen Co., Inc. (Cleveland).

37. Denied, except admitted that at the time of the acquisition of Airco stock by BOC, Airco was engaged in the manufacture and sale in the United States of one or more types

of inhalation anesthetic equipment, as that term is defined in paragraph 1(b) of the complaint, through Ohio.

38. Denied, except admitted that during 1973 Airco purchased from Fraser Sweatman, Inc. anesthetic vaporizers of types not manufactured by Airco.

39. Objected to on the ground that the meaning of "leading" is not clear in the context in which it is used.

40. Objected to for the same reasons as Request No. 39.

41. Objected to on the grounds that the meaning of the term "largest" is not clear in the context in which it is used and that the request is for an irrelevant and immaterial admission.

42. Denied, except admitted that at the time of the acquisition of Airco stock by BOC, Airco was engaged in the United States in the manufacture of one or more types of equipment used in conjunction with other types of equipment to transport medical gas from hospital storage facilities to patient and operating rooms.

43. Denied, except admitted that at the time of the acquisition of Airco stock by BOC, BOC was engaged in the manufacture of one or more types of equipment used in conjunction

with other equipment to transport medical gas from hospital storage facilities to patient and operating rooms in the United Kingdom.

44. Objected to for the same reasons as Request No. 39.

45. Objected to for the same reasons as Request No. 41.

46. Objected to for the same reasons as Request No. 39.

47. Objected to for the same reasons as Request No. 41.

48. Objected to for the same reasons as Request No. 41.

49. Denied, except admitted that in January 1970, J.M. Williams, a managing director of BOC, met with representatives of Chemetron Corporation ("Chemetron") pursuant to an initiative made on behalf of Chemetron to determine whether BOC would acquire a minority interest in Chemetron.

50. Denied, except admitted that in 1971, C.D.L. Perkins of Burdett Oxygen Company (Norristown) visited J.M. Williams, a managing director of BOC, in London, England, and proposed that BOC acquire Burdett Oxygen Company (Norristown). The proposal was rejected by BOC.

51. Denied, except admitted that in 1972, Fraser Sweatman, Inc. manufactured one or more types of inhalation anesthetic equipment, as that term is defined in paragraph 1(b) of the complaint.

52. Objected to on the grounds that BOC's exports to the United States of "medical equipment" are irrelevant and immaterial, as they do not specifically relate to the lines of commerce alleged by complaint counsel.

53. Objected to on the grounds that BOC's exports to the United States of "medical equipment" are irrelevant and immaterial, as they do not specifically relate to the lines of commerce alleged by complaint counsel.

54. Denied, except admitted that in 1972 the sales f Harris-Lake, Inc. were $1,511,901.

55. Admitted.

56. Admitted.

57. Objected to on grounds of relevance and materiality in that the requested admission does not specifically relate to acquisitions in the lines of commerce alleged by complaint counsel and on the further ground that this request is embraced in significant part by Request Nos. 74 through 77.

58. Denied, except admitted that in the fiscal year ending in 1972, Fraser Sweatman, Inc. had sales in the United

States of "anesthetic equipment", which may not be defined in the same way as the term "inhalation anesthetic equipment" as used in the complaint, of $2,145,484.

59. Denied, except admitted that in the fiscal year ending in 1973, Fraser Sweatman, Inc. had sales in the United States of "anesthetic equipment", which may not be defined in the same way as the term "inhalation anesthetic equipment" as the term is used in the complaint, of $2,498,146.

60. Denied, except admitted that in the fiscal year ending in 1972, Cyprane, Inc. had sales in the United States of "anesthetic equipment", which may not be defined in the same way as the term "inhalation anesthetic equipment" as the term is used in the complaint, of $258,499.

61. Admitted.

62. Admitted.

63. Admitted.

64. Denied, except admitted that pursuant to an agreement dated July 25, 1973, BOC and Airco exchanged certain financial information some of which was confidential.

65. Admitted.

66. Admitted.

67. Admitted.

68. Denied, except admitted that the initials "CWCB" on proposed CX-91-B are those of C.W.C. Baird.

69. Denied, except admitted that the initials "CABL" on proposed CX-88-C are those of C.A.B. Leslie.

70. Admitted.

71. Denied, except admitted that the initials "JMW" on proposed CX-74-B are those of J.M. Williams.

72. Denied, except admitted that the initials "LES" on proposed CX-78-D are those of L.E. Smith.

73. Denied, except admitted that the initials "LRD" on proposed CX-83-C are those of L. R. Dingle.

74. Denied, except admitted that CX-14-A was prepared by J. A. Perham and A. Muller, that CX-15-A-Z-8 was prepared by an employee of BOC, and that CX-17 was prepared by A. Muller and received by L. E. Smith, on or about the respective dates thereof.

75. DKI,* except admitted that CX-18-A-O was prepared

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* "DKI" indicates that BOC denies knowledge or information sufficient to admit or deny the allegation, that it has made reasonable inquiry, and that the information known to or readily obtainable by it is insufficient to enable it to admit or deny.

by Dr. A. Muller and received by BOC on or about the date thereof.

76. DKI, except admitted that CX-18-A-O was prepared by Dr. A. Muller and received by BOC on or about the date thereof.

77. DKI, except admitted that CX-18-A-O was prepared by Dr. A. Muller and received by BOC on or about the date thereof.

78. Denied, except it is admitted that during part or all of 1969 and 1970 Allan Perham participated in a study of the industrial gases field in the United States for BOC.

79. DKI.

80. Denied.

81. Admitted.

82. Denied, except admitted that Ohio purchased more goods from Fraser Sweatman, Inc. than any other customer in the fiscal year ended in 1973.

83. Denied.

84. Denied, except admitted that during 1972, Harris-Lake, Inc. sold in the United States one or more products that it purchased from BOC.

85. Admitted.

86. Admitted.

87. Denied, except admitted that during 1967, BOC entered into a joint venture with Air Reduction Company, Inc. to market, design and construct cryogenic plants on a world-wide basis, which joint venture was terminated in 1971.

88. Denied, except admitted that during 1968, the Airco-BOC joint venture obtained a contract from Big Three Industrial Gas and Equipment Company of Houston, Texas to build an air separation plant with a capacity of 1,650 tons per day of nitrogen, 650 tons per day of oxygen and 15 tons per day of argon.

89. Denied.

90. Objected to for the same reasons as Request No. 41.

91. Denied, except admitted that CX-68-A was prepared by J. A. Perham and received by A. I. Ray on or about the date thereof.

92 through 111. Objected to on the grounds (1) that these requests are unduly burdensome in that they fail to specify particular alleged possible acquisitions by specific BOC personnel, thereby making the search required to respond extremely broad, (2) that the Commission has already had extensive discovery of BOC on precisely this subject, thereby

enabling complaint counsel to be more specific, and (3) that these requests duplicate specific requests contained in these requests for admissions, including Request Nos. 29, 30, 49, 50, 57, 74, 75, 76, and 77.

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

PETER LAISTER, being duly sworn, says:

1. I am a managing director of The British Oxygen Company Ltd.

2. I have read the foregoing response to Complaint Counsel's Initial Request for Admission of Facts. The statements therein are true to the best of my information and belief.

Peter Laister

Sworn to before me this
8th day of April, 1974.

Notary Public

LEWIS A KAPLAN
Notary Public, State of New York
No. 60-7158700
Qualified in Westchester County
Commission Expires March 30, 1976

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FEDERAL TRADE COMMISSION
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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

BRITISH OXYGEN COMPANY, LIMITED,
BOC FINANCIAL CORPORATION,
BOC HOLDINGS, LIMITED,
BRITISH OXYGEN INVESTMENTS, LIMITED,
AIRCO, INCORPORATED.

DOCKET NO. 8955

ORDER RULING ON MOTION OF BOC RESPONDENTS FOR A SUBPOENA DUCES TECUM

On March 19, 1974, British Oxygen Company, Limited, BOC Financial Corporation, BOC Holdings, Limited, and British Oxygen Investments, Limited (hereinafter collectively "BOC"), pursuant to Sections 3.33, 3.34 and 3.36 of the Rules of Practice, have requested issuance of a subpoena duces tecum requiring production of certain documentary materials in the files of the Commission. This motion seeks production, inter alia, of two categories of documents:

(1) Documents obtained by the Commission pursuant to some of the specifications of its letter request for documents served upon companies in the industrial gas industry in connection with an industry investigation under File Number 741 0005.*

* BOC has attached to its motion a copy of a demand letter which was served upon Airco, Incorporated, also a respondent in this proceeding. An identical letter was apparently served upon other companies in the industrial gas industry. It is to the various paragraphs of this letter, and documents produced by various companies pursuant to these paragraphs, that BOC has, in part, directed its motion for production.

(2) Documents obtained from parties other than BOC and Airco which are responsive to certain of the specifications contained in a subpoena, dated December 13, 1973, which the Commission served on BOC.*

BOC has also requested as part of its discovery motion a list of all people, including the residence and business address of each, with whom Commission representatives communicated concerning (a) an offer of BOC Financial Corporation, dated December 10, 1973, to purchase 3,000,000 common shares of Airco, Inc., or (b) actual or potential competition in the manufacture or production of, or trade or commerce in, "industrial gases", "inhalation anesthetic equipment", "inhalation therapy equipment", or "medical pipeline systems", as those terms are used in the complaint.

The demand is not to be construed to require production of documents which the Commission received from BOC or Airco, or to any complaints by distributors of industrial gases concerning the manufacturers of industrial gases.

Specifically, BOC's demand is as follows:

"1. Each document produced by any company during the Commission's investigation of the industrial gas industry pursuant to items 1 through 5, 9, 13, 14, 16 through 18, 24, 32 and 33 of the Commission's requests for the production of documents in that investigation, a sample of which is attached hereto as Exhibit A.

"2. Each document obtained by the Commission during the course of its investigation of the industrial gas industry pursuant to items 1 through 3, 6 through 8, 10, 11, and 14 through 16 of the Commission's request for access to files appearing at pages 6 and following of Exhibit A hereto.

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* A copy of the Commission's subpoena in File Number 741 0005 served on BOC Financial Corporation was included in BOC's Supplement To Motion Of BOC Respondents For A Subpoena Duces Tecum.

"As part of its investigation of industrial gases and of the BOC-Airco transaction, the Commission served a subpoena duces tecum, dated December 13, 1973, on Adrian W. DeWind, President and Director of BOC Financial Corporation. The purpose of specifications 3 and 4 hereof is to obtain documents in the Commission's possession that are responsive to parts of that subpoena and were obtained from sources other than BOC and Airco.

"3. Each document responsive to specification 1 of the subpoena duces tecum served by the Commission on Adrian W. DeWind, President and Director, BOC Financial Corporation, on December 13, 1973.

"4. Each document which refers to, analyzes, compares, comments on, sets forth, or relates to the following:

"(a) Entry by any person or organization into the production, distribution and sale in the United States of industrial gases, as that term is used in the complaint, or

"(b) Entry of change in the market shares of any person or organization in the production, distribution and sale in the United States of 'inhalation anesthetic equipment,' 'inhalation therapy equipment,' or 'medical pipeline systems,' as those terms are used in the complaint.

"5. A list of all people, including the residence and business addresses of each, with whom any Commission representative communicated concerning:

"(a) An offer of BOC Financial Corporation, dated December 10, 1973, to purchase 3,000,000 common shares of Airco, Inc., or

"(b) Actual or potential competition in the manufacture or production of, or trade or commerce in, 'industrial gases,' 'inhalation anesthetic equipment,' 'inhalation therapy equipment,' or 'medical pipeline systems,' as those terms are used in the complaint.

* * *

"This subpoena shall not be construed to require the production by the Commission of (a) any documents which the Commission obtained from either BOC or Airco or (b) any complaints by distributors of industrial gases concerning the manufacturers of industrial gases."

In its motion BOC stresses that the Commission's complaint alleges the acquisition of 35% of Airco's stock by BOC may be substantially to lessen competition or tend to create a monopoly in the industrial gas market. BOC is seeking from the Commission only documents of the same kind which the Commission has already obtained from BOC and Airco, and from other companies in the United States industrial gas industry; also documents obtained by the Commission in its subsequent investigation of BOC's acquisition. BOC thus has explained the "general relevancy" of the documents being sought as being those determined to be relevant by complaint counsel in their investigations of the industrial gas industry and of BOC's acquisition.

BOC also states that, since the trial of this matter is to be on an expedited basis, it is simply not feasible as a practical matter for BOC to obtain these documents from companies engaged in the industrial gas industry.

BOC maintains that there is no reasonable basis for denying respondents access to these materials. Complaint counsel has access to these third-party documents and will undoubtedly use these materials in preparing the Commission's case. BOC states it is willing to consent to any reasonable protective order to preserve the confidentiality of these documents.

At the prehearing conference held herein on March 28, 1974, BOC's counsel, at the request of the undersigned, made a lengthy presentation of the relevancy and need of each of its specific requests for documentary materials (see prehearing transcript at pages 44-66).*

By answer filed March 25, 1974, complaint counsel opposed BOC's motion for production of documents which

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* BOC also filed, on April 1, 1974, a Memorandum Of Law In Support Of BOC Respondents' Motion For A Subpoena Duces Tecum.

the Commission has obtained from third parties. Complaint counsel's opposition can be categorized generally as follows:

(1) BOC's motion is deficient with respect to the requirements of Section 3.36 of the Rules of Practice;

(2) Specification 5 of BOC's request is a general interrogatory which would require complaint counsel to compile a list of persons contacted by Commission representatives, and is not a request for documents;

(3) BOC's requests seek documents obtained by the Commission in a general industry-wide investigation, and thus such documents have no relevancy to the instant proceeding, which challenges a specific acquisition, and are thus too broad and unreasonable;

(4) BOC has failed to establish that these documents are not available from third-party sources; and

(5) The documents contain highly sensitive information and thus their confidentiality should be protected.

At the prehearing conference held on March 28, 1974, complaint counsel advised the undersigned that the third parties, whose documents were involved with BOC's request, had been promised confidential treatment for such documents produced by said parties to the Commission, and that said parties were promised a ten-day notice prior to the release of any such documents from confidential status (see prehearing transcript, pages 39-43, 70-71). Accordingly, third parties were notified that some of their documents might be ordered turned over to respondents in this proceeding, and that they could file briefs and make an appearance before the undersigned at the prehearing conference to be held on April 17, 1974. Thereafter, the undersigned did receive briefs or letters from ten industrial gas companies. Copies of these

papers are attached hereto and made a part hereof.*

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* 1. Air Products and Chemicals, Inc. - Letter to the undersigned, dated April 15, 1974, with enclosure of Protective Order Respecting Release of Documents Submitted To The Commission By Certain Corporations Not Parties To This Proceeding, from its attorneys, Covington & Burling, Washington, D.C.

2. Big Three Industries, Inc. - Application of Big Three Industries, Inc. For Protective Relief, filed April 12, 1974.

3. Burdett Oxygen Co. of Cleveland, Inc. - Letter to the undersigned, dated April 9, 1974, with enclosure of Motion of Burdett Oxygen Co. of Cleveland, Inc. For Protective Order, from its attorneys, Ulmer, Berne, Laronge, Glickman & Curtis, Cleveland, Ohio.

4. Chemetron Corporation - Letter to the undersigned, dated March 29, 1974, from its attorneys, Kirkland & Ellis, Chicago, Illinois.

5. Liquid Air Corporation of North America - Two letters to the undersigned, dated March 21 and April 2, 1974, from its attorneys, Coudert Brothers, New York, N.Y.; Opposition of Liquid Air, Inc. To BOC Respondents' Motion For Subpoena Duces Tecum, filed April 12, 1974.

6. Liquid Carbonic Corporation - Letter to the undersigned, dated April 11, 1974, signed by its Vice President and General Manager.

7. National Welders Supply Company, Inc. - Letter to the Secretary of the Federal Trade Commission, dated April 9, 1974, from its attorney, Fred T. Lowrance, Esq., Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, Charlotte, North Carolina.

8. Pacific Oxygen Company - Undated letter to Federal Trade Commission from its attorneys, Guidotti and Mellana, Oakland, California.

9. Union Carbide Corporation - Letter to complaint counsel, dated March 15, 1974, from its attorneys, Wald, Harkrader & Ross, Washington, D.C.; Application of Union Carbide Corporation For Protective Relief, filed March 19, 1974; letter to the undersigned, dated April 5, 1974, with attachment of copy of Commission letter to Robert L. Doan, Esq., New York, N.Y., from its attorneys; letter to the undersigned, dated April 18, 1974, from its attorneys; revised proposed Protective Order Respecting Release of Documents Submitted To The Commission By Certain Corporations Not Parties To This Proceeding.

10. Whitmore Oxygen Company - Letter to the undersigned, dated April 5, 1974, signed by its Vice-President, Manager.

Further, representatives of some of these companies appeared at the prehearing conference held on April 17, 1974 and made oral presentations.

The third parties generally objected to production of any documents to BOC on the grounds that such documents were voluntarily turned over to the Commission under a promise of confidential treatment. Each party appearing stressed the highly confidential nature of the materials, especially such information as production capacities, rates of return, marketing analyses, future marketing strategies, customer names, specific current costs, termination dates of customer contracts, prices to individual customers, and new plant studies. Each such party also requested a strict protective order in the event any information is turned over to BOC.

The Commission's rule covering requests for production of documents in the Commission's files establishes certain criteria which respondents are expected to meet before an order will issue requiring production of such documents (see Section 3.36(b)). These criteria include (1) a specification as exactly as possible of the material to be produced; (2) a statement of general relevancy of the material and the reasonableness of the request; and (3) a showing that such material is not available from other sources either voluntarily or by use of authorized compulsory process.

The undersigned is of the opinion that, as to categories of documents hereinafter ordered to be produced, BOC has made a sufficient specification of the materials sought, and a showing of general relevancy for discovery purposes. First, BOC has used specifications which Commission counsel used during a recent industry investigation. There can be no doubt at all which documents are being sought, although some of the specifications are very general. Relevancy will be discussed hereinafter in respect to each of BOC's specific requests.

This leaves for consideration the requirement in Section 3.36(b) that BOC make a showing that such documentation is not available from third parties. BOC states, in this respect, that, since this matter is to be tried on an expedited basis, time will not permit BOC to seek discovery from third parties. BOC also argues that it is lacking in familiarity with the United States industrial gas market since it is not engaged in such market. Further, it can be expected that third parties will not cooperate with BOC in duplicating the Commission's discovery efforts.

The undersigned considers these latter two arguments -- the lack of familiarity with the United States market and the expected lack of cooperation of third parties -- to be

without merit. However, in this matter the Commission has sought and obtained an injunction restricting BOC's ability to manage its $80 million investment in the stock of Airco. The United States District Court for the District of Delaware has ordered an expedited trial, as has the Commission (see the Commission's Order Denying Motion For Fixed Schedule, dated April 2, 1974). Thus, BOC's argument with respect to the time element warrants serious consideration.

The Commission is under Court order to expedite this proceeding. The undersigned is of the opinion that, where the Commission has made a recent investigation of the industrial gas industry and has readily available clearly identifiable and highly relevant documentary evidence which may be useful to respondents, the requirement that respondents first exhaust third-party sources before seeking documents in the Commission's possession would unnecessarily delay the trial of this matter. It obviously would not be a step toward expediting the trial. The undersigned is accordingly ruling that certain documentary materials in the Commission's files be made available to BOC, as set forth hereinafter.

Third-party arguments as to confidentiality do not constitute a basis for denying production of documents in the Commission's files to BOC. If BOC were to subpoena directly from such third parties relevant documents containing confidential information, such information would have to be produced. The fact that third-party documents are being made available to BOC by the Commission does not make arguments as to confidentiality the basis for a denial of production of relevant documentary materials. In fact, the Commission's letter to Robert L. Doan of Union Carbide Corporation specifically stated that any assurances as to confidentiality were given with the understanding that, in the event an adjudicative complaint issued, the limitations on disclosure shall be governed solely by the applicable provisions of the Commission's Rules of Practice (see attachments hereto).

The confidential nature of the documents does, however, require a strong showing of need. As the Commission stated:

> "Sensitive information of this nature should not be released by the Commission from its confidential files without compelling need." The Seeburg Corporation, Docket No. 8682, Commission Opinion, October 25, 1966 (70 F.T.C. 1809, 1813).

Further, the confidential nature of the documents will be preserved through entry of a strict protective order.

BOC has requested each document produced by any company during the Commission's investigation of the industrial gas industry pursuant to items 1 through 5, 9, 13, 14, 16 through 18, 24, 32 and 33 of the Commission's letter of request served upon various companies. While this letter of request apparently involved an industry-wide Commission investigation of the industrial gas industry, certain of the numbered requests are relevant to this proceeding which includes allegations respecting actual and potential competition in the industrial gas industry and appear to represent proper discovery requests.

Item 1 calls for the capacity of plants producing industrial gas during the years 1967 to date of the letter of request. BOC contends that its decision to enter the United States market may or may not have been influenced by unutilized capacity (prehearing transcript, page 49). Documents showing production capacity may be relevant to the issues in this proceeding. Accordingly, complaint counsel are ordered to produce all documents concerning industrial gas plant capacity. Item 1 also calls for costs to construct the industrial gas plants; however, BOC has withdrawn its request for such cost documents (prehearing transcript, page 50).

Item 2 calls for a statement indicating actual production of each industrial gas in terms of cubic feet and dollars. While production figures of industrial gases are obviously relevant to this proceeding, production of each gas may not be relevant. The documents called for by Item 2, when combined, would show total production, and they therefore would be highly relevant to this proceeding. Complaint counsel are ordered to produce these documents to BOC.

Item 3 calls for a statement of total net sales of each industrial gas for the years 1967 to 1972. Total sales are relevant, as are actual production figures, and these documents are hereby ordered to be produced to BOC.

Items 4 and 5 call for net sales of industrial gases for the years 1967 to 1972 to (a) direct industrial accounts, and (b) distributors. There is no indication to date that complaint counsel will contend that sales to direct industrial accounts or sales to distributors

constitute separate markets. BOC argues that, at a minimum, it needs to know about sales to direct industrial accounts as these accounts may be, in effect, captive accounts of the industrial gas producer which may have a plant located close to the industrial user (prehearing transcript, page 51). Thus, at this stage of the proceeding, it appears that sales to direct industrial accounts may have some relevance to this proceeding, and such documents must be produced to BOC by complaint counsel. Documents indicating net sales to distributors need not be produced.

Item 9 of the Commission's letter of request calls for copies of all price schedules, together with any trade announcements which preceded or accompanied any price schedules. BOC is seeking price schedules, not details of individual transactions. BOC is not seeking actual selling prices, but price schedules (prehearing transcript, page 53). BOC is apparently interested in establishing that prices have declined, which would make BOC's market entry unlikely. Complaint counsel, in their opposition to respondents' request, have acknowledged the relevancy of price schedules (Complaint Counsel's Supplemental Memorandum, page 10, filed April 1, 1974). Accordingly, all price schedules furnished to complaint counsel must be made available to BOC.

Items 13 and 14 call for documents relating to exchange agreements between producers of industrial gases during the period 1967 to 1972. BOC states that one of its defenses will be that it is very difficult to persuade an industrial gas customer to accept a company, especially a foreign company, as a supplier of oxygen unless the supplier can assure the customer that the supplier has backup capacity available in the event of a plant shutdown (prehearing transcript, pages 53-54). Exchange agreements would be relevant to this alleged defense. Accordingly, documents in complaint counsel's possession responsive to Items 13 and 14 must be produced to BOC.

Item 16 calls for documents indicating industrial gas accounts obtained by an industrial gas producer while such customer was under contract with another producer. BOC states that such documents are relevant to ease of entry into the market. If there are long-term supply contracts, and if the customers do not change suppliers, this would bear on ease of entry into the industrial gas market. BOC also references in this

regard the recent Supreme Court decision where there were long-term supply contracts in the coal industry (prehearing transcript, page 54). At this stage of the proceeding, these documents may well have some relevance to BOC's defense, and complaint counsel are ordered to turn these documents over to BOC.

Item 17 calls for statements indicating the types of facilities manufactured by industrial gas producers. According to BOC, these documents relate to the capacity of industrial gas companies to build industrial gas plants. BOC will apparently argue that Airco does not have the capacity to build an industrial gas plant, and that BOC will provide such capacity. This relationship between BOC and Airco, BOC will argue, enhances competition. All documents called for by Item 17, which relate to the ability or capacity of an industrial gas producer to build an industrial gas production facility, must be turned over to BOC.

Item 18 calls for a list of the customers for industrial gas that made a request for bids to purchase equipment manufactured by each industrial gas producer and used for the production of industrial gas during the period 1967 to 1972. BOC argues that this Item is designed to develop the degrees of shopping around that companies do in this market (prehearing transcript, page 55). To the undersigned, this Item is not entirely clear, and BOC has not clarified the request. This Item seems to the undersigned to request information concerning equipment manufactured by industrial gas companies. The relevance of this Item to production of industrial gas is not clear. Accordingly, documents relating to Item 18 need not be produced.

Item 24 calls for rates of return for each type of industrial gas produced for the years 1967 to date of the Commission's letter of request. BOC admits such documentation constitutes a "delicate area", but nevertheless is "critical" (prehearing transcript, page 56). Rates of return in the industrial gas industry appear relevant, and complaint counsel are ordered to produce the documentation called for by Item 24.

Items 32 and 33 relate to reports submitted to the Department of Commerce and the Bureau of Census concerning actual production and production capacity. BOC's justification for production of these reports is to secure a

"compatibility of figures". There is no indication at present that a problem of compatibility of figures will arise. It is not known what source or sources complaint counsel will rely upon to establish market dates. BOC is receiving actual data as to production and production capacity under other specifications of its demand. Thus, the "concrete need" for these highly confidential reports has not been established and no documents relevant to these items need be produced.

BOC's next specification calls for all documents produced in connection with Items 1-3, 6-8, 10-11, and 14-16 of that portion of the Commission's letter which requested access to certain files of industrial gas companies. These Items concerning the Commission's access to the files of the various companies will now be considered.

It is immediately observed that Items 1-3 and 6-8 of the Commission's letter are extremely broad and general. The Items call for all files concerning the following broad and general categories:

(1) Activities and policies relating to the production and marketing of industrial gas;

(2) The production and marketing actions of other (including potential) producers and distributors of industrial gas products;

(3) Marketing actions relating to other producers of industrial gas and/or their distributors;

(4) Analysis of national or regional markets in the industrial gas industry;

(5) Reports or information provided to and/or received from each and all other extra company production or marketing research organizations; and

(6) Plans for expanding or reducing production and/or distribution of industrial gas products.

In respect to the above Items, BOC is seeking marketing strategies and future planning reports of other companies.

These documents are highly confidential and likely refer to plans and activities extending into the future. This is an area which was termed highly confidential by the third parties who appeared before the undersigned. As stated, these requested categories are broad and general; BOC has not specified with any degree of exactness the nature of the material to be produced, nor the relevance of such documents. BOC desires to see what other companies projected as to the industrial gas market. The relevance of what other companies projected, unknown to BOC, has little relevance or probative weight. BOC's request for documents relating to regional markets is irrelevant since the complaint does not allege regional markets. Accordingly, documents furnished in respect to the foregoing Items do not have to be produced.

Items 10 and 11 relate to construction of pipelines and the tendering of bids to customers purchasing industrial gas products by pipelines. BOC states that these Items concern ease of entry into the industrial gas market. Documents called for by these Items may indicate whether industrial gas customers served by pipeline are available as possible customers for new entrants (see prehearing transcript, pages 61-62). Therefore, documents called for by these Items must be produced to BOC.

BOC has waived production of documents called for by Items 14 and 15 of the Commission's letter requesting access; therefore, no documents responsive to these Items need be produced (prehearing transcript, page 62).

Item 16 calls for documents concerning acquisitions and/or joint ventures relating to the production, distribution and sale of industrial gas products. BOC contends that these documents will show if the industrial gas industry is becoming more concentrated within recent years, and whether BOC could have entered this market through joint venture (prehearing transcript, pages 62-63). Documents responsive to this Item seem relevant to BOC's possible defenses and must be produced by complaint counsel to BOC.

BOC has requested each document in the Commission's files, which is responsive to Specifications 1 and 6 of a subpoena duces tecum served on BOC after the commencement of the Commission's investigation of the BOC acquisition of Airco stock which the Commission obtained from sources other than BOC and Airco. Item 1 of the

Commission's subpoena to BOC called for documents which refer, analyze, compare, comment on, set forth or relate to, BOC's agreements with Airco, including BOC's offer to purchase the stock of Airco, meetings between BOC and Airco, the offer of Curtiss-Wright Corporation to purchase shares of Airco, and the interest of any other company in acquiring shares of Airco. BOC was hard-pressed to explain the relevancy of this request. BOC's counsel finally stated that "I might get lucky" (prehearing transcript, page 64). As previously stated, under the Commission's Rules of Procedure there must be an exact specification as to the documents desired, and a strong showing of need for such documents. Comments of other companies on BOC's offer to purchase Airco stock, or offers by other companies to purchase Airco stock have little apparent relevancy to the instant proceeding. Discovery of confidential information in the Commission's files will not be permitted on the mere showing that respondents might find a "lucky one":

> ". . . subpoenas are not issued on bare suspicion. They are not licenses for extended fishing expeditions in waters of unknown productivity in the vague hope of 'catching the odd one'." Coro, Inc., et al. v. F.T.C., 338 F.2d 149, 153 (1st Cir. 1964).

The documents called for by Item 1 of the Commission's request for access need not be produced.

BOC's Specification 4 corresponds to Specification 6 of the Commission's investigational subpoena duces tecum issued to BOC. BOC, through this Specification, is calling for documents the Commission obtained from third parties which refer, analyze, compare, comment on, set forth or relate to the following:

(a) Entry by any person or organization into the production, distribution and sale in the United States of industrial gases, or

(b) Entry or change in the market shares of any person or organization in the production, distribution, and sale in the United States of "inhalation anesthetic equipment", "inhalation therapy equipment", or "medical pipelines".

The above documents concern markets alleged in the complaint and BOC is using the terms as alleged in the complaint. BOC has limited the request to documents relating to the manufacturer or producer level, and has eliminated from its request documents relating to distribution and sale of the relevant products (prehearing transcript, page 65). Documents relating to possible entry into the complaint markets, or change in market shares of companies engaged in the complaint markets may have relevance to BOC's defense. Documents called for by this Specification, as limited by BOC at the prehearing conference, must be produced to BOC by complaint counsel.

The final request by BOC (Specification 5) calls for a listing of persons contacted by complaint counsel concerning BOC's offer to purchase Airco stock and concerning actual or potential competition in the complaint markets. BOC counsel acknowledges that this request is a "little unusual" but is justified because BOC is a "total stranger" to the United States market (prehearing transcript, page 66). BOC counsel has other and more productive avenues of developing information available to it than following a listing of persons with whom Commission representatives "communicated". Airco, a knowledgeable company in the relevant markets, is available for help. Governmental reports and studies are available. The complaint alleges that BOC through subsidiaries is engaged in some of the complaint markets. Thus, BOC is no total stranger to the complaint markets, nor does it have to rely upon a listing of Commission "contacts" to develop its defense. This request for a listing of Commission "contacts" seems to be in the nature of a "fishing expedition" and lacks a showing of necessity. Accordingly, complaint counsel need not furnish BOC with a listing as called for by this Specification.

The above order making documentation available to BOC does not necessarily mean such documents are admissible at trial; BOC has made a discovery request, and this ruling makes documents available to BOC for discovery purposes. Since potential entry, and whether BOC is the most likely potential entrant, is an issue in this proceeding, BOC's discovery request has been liberally construed. Admissibility will be considered at a later date, if necessary.

As requested by third parties at the prehearing conference held on April 17, 1974, complaint counsel are ordered to wait five (5) days from the date of service of this order before turning any documents over to BOC. This time interval is granted so that third parties

may seek Commission review of this ruling, if they so desire.

The following protective order shall apply to each document turned over to BOC by complaint counsel pursuant to this order.

PROTECTIVE ORDER

(1) Each document turned over to BOC by this Order shall be made available only to independent outside counsel of record in this proceeding representing BOC respondents and Airco, Incorporated who are not officers, directors or employees of BOC respondents and Airco, Incorporated, until further order of the Administrative Law Judge or the Federal Trade Commission. BOC respondents are hereby ordered to file as an official document of record in this proceeding the names of such counsel who will have access to these documents pursuant to this provision of this protective order.

(2) Any documents subject to this Order, and any information learned therefrom, shall be used only for purposes of this proceeding and for no other purpose.

(3) Independent outside counsel for BOC respondents and Airco, Incorporated may disclose such documents to independent designated experts, who are not officers, directors or employees of BOC respondents and Airco, Incorporated, upon identification to the undersigned consisting of a notice filed as an official document in this proceeding, for the purpose of enabling independent outside counsel to receive the advice and assistance of such persons in the defense of this matter; provided that said experts shall agree, by affidavit made a part of this proceeding, to protect and maintain the confidentiality of such documents, and any information obtained therefrom, under the same conditions of this protective order as are applicable to independent outside counsel.

(4) Independent outside counsel may make application to the undersigned to disclose such documents to other specified persons properly identified to the undersigned, together with a showing in detail of the reasons why it is necessary to disclose same to such persons. The undersigned will take under advisement any such application

and make a ruling consistent with the purposes of this protective order and the confidentiality of the documents involved.

(5) Except as permitted by the undersigned, no copies of the documents furnished to independent outside counsel pursuant to this Order shall be made, and all copies of such documents, together with all notes, memoranda, and other papers containing information obtained therefrom, shall be returned to the Commission upon the termination of this proceeding.

(6) Should information subject to this Order be offered in evidence in this proceeding, counsel shall give the third party or parties whose information is being offered into evidence ten (10) days written notice prior to offering such information in evidence, and such third parties shall be given an opportunity to move for an appropriate in camera order pursuant to Section 3.45 of the Commission's Rules of Practice.

Finally, in the event that any document ordered turned over to BOC respondents pursuant to this Order contains highly confidential information not relevant to the particular requests of BOC, complaint counsel may propose to the undersigned an excised version of the document which complaint counsel propose to turn over to BOC in lieu of the entire document, together with the unexcised version of the document for examination by the undersigned. The undersigned will at that time determine whether the unexcised document, complaint counsel's proposed excised document, or some other version of the document shall be turned over to BOC. Accordingly,

IT IS HEREBY ORDERED that complaint counsel, commencing five (5) days after service of this Order, shall promptly turn over to BOC all documents herein ordered made available to BOC.

Ernest G. Barnes

Ernest G. Barnes,
Administrative Law Judge.

April 23, 1974

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OF COUNSEL

TWX 710-822-0005
TELEX 89-593
CABLE: COVLING

April 18, 1974

The Honorable Ernest G. Barnes
Administrative Law Judge
Federal Trade Commission
Washington, D.C. 20580

Re: British Oxygen Company, Limited, et al., Docket No. 8955

Dear Judge Barnes:

This letter summarizes the position of Air Products and Chemicals, Inc., with respect to the Motion of BOC Respondents for a Subpoena Duces Tecum filed in this proceeding on March 19, 1974.

Air Products has made no prior filing respecting this subpoena in view of Your Honor's ruling at the prehearing conference held March 28, 1974, that you did not plan to entertain written submissions prior to an initial ruling on BOC's motion. However, at yesterday's conference I believe you indicated that some letters and motions had been received, that you expected to rule on BOC's motion on Friday of this week, that written submissions filed prior to your ruling would be incorporated in the record, and that you did not plan to entertain written objections or motions by third parties thereafter. In light of that, and in order to supplement the presentation made by Air Products' representatives at yesterday's prehearing conference, I am taking the liberty of setting forth by letter a summary of the position of Air Products. In the event Your Honor decides to withhold ruling on the motion on Friday and desires more complete briefing on any of these points, Air Products is prepared to meet whatever time schedule is convenient to Your Honor.

I.

Air Products' basic position is that the motion should be quashed in its entirety. That is so for a number of reasons. First, virtually all of the documents are confidential business records of Air Products. The records include pricing lists, future plans, elaborate cost data, detailed financial information, customer lists, and an enormous volume of other corporate records, none of which are regularly made public. The records were turned over to the Federal Trade Commission, not because they were deemed nonconfidential, but in a spirit of cooperation with the Government and on the understanding that the documents would be retained by the Government and never revealed to outsiders. The authorities are clear that an innocent third party is entitled to special protection against the wholesale invasion of confidential documents, a principle which applies with particular force when a disinterested third party voluntarily produces documents to the Government on the understanding that those documents would be afforded confidential treatment. See, e.g., FTC v. Bowman, 149 F. Supp. 624, 629-30 (N.D. Ill. 1957); Mississippi River Fuel Corp., FTC Dkt. No. 8657 (Interlocutory Order, October 8, 1965); United States v. Serta Associates, 29 F.R.D. 136, 138 (N.D. Ill. 1961); Less v. Tabor, 53 F.R.D. 645, 647 (W.D.N.Y. 1971).

Second, movants have not satisfied their burden to demonstrate the "general relevancy of the material and the reasonableness of the scope of the subpoena." FTC R. Prac. 3.34(b). As part of that showing, the subpoenaing party must demonstrate a clear and substantial "need" for the documents in order to present its case. Kellogg Co., et al., Dkt. No. 8883, Prehearing Conf. Order, May 3, 1973; Pa ercraft Corp. v. FTC, 472 F.2d 927, 929-30 (7th Cir. 1973). It is also settled that a "strong showing of relevance is necessary" before a third party will be required to reveal confidential documents. Zenith Radio Corp. v. RCA, 106 F. Supp. 561, 565 n.6 (D. Del. 1952); Independent Productions Corp. v. Loew's, Inc., 7 Fed. Rules Serv.2d 34.41, Case 1 (S.D.N.Y. 1963); Spier v. Home Insurance Co., 404 F.2d 896, 899 (7th Cir. 1969); Crown Cork & Seal Co., [1967-69 Transfer Binder] Trade Reg. Rep. ¶ 17,828, at 23,201 (FTC 1967). As complaint counsel's memoranda in opposition to the motion demonstrate, that showing has not and cannot be made here.

Third, in any event we do not believe that respondents should be entitled to gain access to this information on the basis of a broad and ill-defined subpoena served upon the Commission. We believe, as complaint counsel's memoranda suggest, that to the extent that respondents desire access to third party documents, they should seek those documents by narrow and specific subpoenas served upon individual third parties. If respondents had followed that course, they could have narrowed their requests for information to specific categories and documents which are known to be, or thought to be, in the files of individual third parties. That procedure would also permit individual negotiation between respondents and third parties which might obviate the necessity for any ruling by Your Honor or at least substantially narrow the issues in the items in dispute.

In sum, we believe that this subpoena should be quashed and that respondents should proceed, to the extent that third party documents are necessary, by subpoenaing narrow categories of documents from individual third parties.

II.

In the event that the subpoena is not quashed, we believe that it should be limited by excluding from the subpoena several categories of extremely sensitive documentation, the disclosure of which could irreparably injure Air Products and the other parties whose documents are the subject of respondents' motion. As amplified in the statement presented to you yesterday by Daniel L. McGinnis, Controller, Industrial Gas Division of Air Products, the following categories of documents in the Commission's files are subject to the borad sweep of BOC's subpoena:

1. "Five-year plans" and other documents revealing the Company's current marketing plans and strategies.

2. Names of individual Air Products customers or other opposite parties in contracts or contract negotiations.

3. Particularized cost data.

4. Selling prices to individual accounts and documents setting forth the termination dates of sales contracts and the locations of contracting parties.

5. Rates of return and investment data.

6. Several documents which have been supplied to Air Products by other parties on an express agreement that Air Products would not reveal those documents to outsiders.

We believe that any order entered in this case should recognize the extreme sensitivity of these categories of documents and provide that all such data should be excluded from documents produced to BOC.

III.

Your Honor requested yesterday that third parties identify the kinds of protective conditions which should be included in an order directing production of any of the documents sought by BOC. To reiterate, we do not believe that a protective order is indicated because we believe that the present subpoena should be quashed. And we emphasize that in no event should the categories of documents set forth in point II above be produced even pursuant to a protective order. No protective order can guarantee confidentiality; and those documents are so sensitive that no risk of disclosure to anyone is justified. However, to the extent that Your Honor orders production of any of the documents sought by BOC, we believe that a protective order should be entered along the lines of the proposed order which I submitted to you yesterday. Enclosed is an additional copy of that proposed order. As you are aware, respondents have indicated that, with insubstantial modifications, the proposed protective order is satisfactory with respect to any documents which Your Honor orders to be produced.

IV.

Because of the extreme sensitivity of the documents subject to the BOC motion, we respectfully request a stay of any order requiring production of any of these documents to permit an appeal from any such order to the Commission or the courts.

Respectfully submitted,

Robert N. Sayler
Counsel for Air Products and Chemicals, Inc.

Enclosure
cc: K. Keith Thurman, Esquire
Jay H. Topkis, Esquire
Third Parties

A 153

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED.	DOCKET NO. 8955

PROTECTIVE ORDER RESPECTING RELEASE OF DOCUMENTS SUBMITTED TO THE COMMISSION BY CERTAIN CORPORATIONS NOT PARTIES TO THIS PROCEEDING

Under authority of sections 3.21 and 3.42 of the Commission's Rules of Practice and consistent with the terms of the Order issued this date on the Motion of BOC Respondents for a Subpoena Duces Tecum:

IT IS ORDERED THAT:

1. Until further order of the Administrative Law Judge or upon order of the Federal Trade Commission, and except in accordance with the terms of this Order, there shall not be any disclosure to any individual of the documents listed in paragraph 3 below. This prohibition, and the procedures specified hereinafter, shall not apply to any disclosure made to the Federal Trade Commission or any of its officers, employees, administrative law judges, or consultants subject to statutory obligation to maintain confidentiality of information.

2. Any documents subject to this Order, or the information learned therefrom, shall be used only for purposes of this proceeding and for no other purpose.

3. The documents subject to this Order are those documents mentioned in the Order issued this date in respect to the Motion of BOC Respondents for a Subpoena Duces Tecum.

4. The documents subject to this Order shall be revealed only to the following categories of "qualified persons": (i) designated outside counsel of record engaged in the preparation for trial of this proceeding for the parties, including designated associate attoneys and stenographic and clerical employees assisting such counsel, and (ii) designated experts not employed by, consultants to, or otherwise affiliated with the parties who are assisting counsel in the preparation of this proceeding for trial.

5. Any information subject to this Order shall be made availableonly to qualified persons who shall have read this Order and who shall agree to maintain said information in confidence and not to use or reveal the same to anyone (including attorneys or other personnel employed by the law firms representing respondents, other than specifically designated persons in the litigation departments of those firms) except in accordance with this Order, and not to use the same except in connection with the trial or preparation for trial of this proceeding,

except that nothing shall prevent disclosure beyond the terms of this Order prior to trial if the supplying party claiming confidentiality consents in writing to such disclosure.

6. All documents subject to this Order, and notes or other records regarding the contents thereof, shall be maintained in the custody of designated outside counsel to the parties, and no partial or complete copies thereof shall be retained by anyone else at any other location than the offices of outside counsel or the offices of complaint counsel.

7. The requirements of paragraph 5 above shall be satisfied with respect to each designated expert and each designated outside counsel only upon their agreement in writing to be bound by the terms of this Order prior to their receipt of these documents in the following form:

> "I hereby acknowledge that I [name], [position of employment], am about to receive confidential information supplied to the Federal Trade Commission by [ ]. I certify that my understanding is that such information is to be provided to me pursuant to the terms and restrictions of the Protective Order of [date] in British Oxygen Company, Limited, et al., FTC Docket Docket No. 8955, and that I have been given a copy of and have read said Order and agree to be bound by the terms thereof. I understand that such information and any copies I make of this material or any notes or other records that may be made regarding any of such information shall not be disclosed to others, except pursuant to the terms of said Order."

Counsel for each party shall maintain a list of the names of all persons to whom documents subject to this Order are disclosed.

8. Upon final termination of this proceeding, the parties shall assemble and return to each supplying person all documentary material and memoranda embodying information subject to this Order, including all copies of such memoranda or documentary material, but not including any notes or other attorney's work product that may have been placed thereon by counsel for the receiving party.

9. Upon notice to the supplying party concerned of the intention of counsel of record to disclose a document subject to this Order on the public record, the supplying party shall, within ten days after receiving such notice, state whether he objects to disclosure. In the event that objection is made, counsel for the party desiring to make disclosure and the supplying party shall make a good faith effort to resolve the objection. Said effort shall be completed within five days after objection was made. Failing such resolution, if the third party wishes to pursue its objection, within ten days after completion of efforts to reach a resolution, the supplying party shall seek a protective order of the Administrative Law Judge, which shall be granted for good cause shown.

10. To the extent that an application for a protective order involves a request for in camera treatment

within the scope of section 3.45 of the Rules of Practice, the disposition of such request will be governed by the provisions of that rule. However, in no event will respondents, as distinguished from their counsel, be entitled to view in camera any information subject to this Order. Nor may respondents oppose in camera treatment for any of this information.

11. As used herein, the term "document" includes any extract therefrom or summary thereof.

Administrative Law Judge

Dated:

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APR 12 SECRETARY

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

IN THE MATTER OF	)	
	(	
BRITISH OXYGEN COMPANY, LTD.	)	
BOC FINANCIAL CORPORATION,	(	DOCKET NO. 8955
BOC HOLDINGS, LTD.,	)	
BRITISH OXYGEN INVESTMENTS, LTD.,	(	
AIRCO, INCORPORATED	)	

TO: The Honorable Ernest G. Barnes, Administrative Law Judge

APPLICATION OF BIG THREE INDUSTRIES, INC.
FOR PROTECTIVE RELIEF

Big Three Industries, Inc. ("Big Three"), not a party to this proceeding, through its counsel, appears specially and hereby applies to the Administrative Law Judge for an order granting it protective relief, as hereinafter set forth, with respect to the production in this proceeding of documents and data supplied by Big Three to the Commission in the course of the staff investigation in File No. 741 0005. In support of this Application, counsel for Big Three would respectfully show the following:

I.

On or about November 2, 1973, at the specific request of the Commission staff, Big Three voluntarily produced numerous documents in connection with the Commission's investigation of trade practices in the industrial gas

industry, File No. 741 0005. In telephone conferences with Commission staff attorneys and by its letter dated November 2, 1973, Big Three expressly advised the Commission and the staff that the information furnished was privileged and confidential, contained Big Three's trade secrets and names of its customers, and also contained the company's commercial and financial information. Accordingly, all such responses and materials were tendered to the Commission in trust, and with the request that same be placed in a confidential file. Big Three also would show that even absent such conditional delivery in trust, the data furnished is confidential and not subject to disclosure by reason of §6(f) of the Federal Trade Commission Act, and Commission Rules 4.10(a)(2) and 4.10(a)(5).

II.

Big Three has been advised that Respondents in the captioned cause are seeking access to such documentation and information furnished by Big Three. Respondents reportedly are making the request even though Big Three furnished the data in connection with the Commission's general investigation of trade practices of the industrial gas industry, not in connection with the captioned matter. Big Three's information is that this cause originated due to the acquisition by British Oxygen Company, Ltd. of shares of stock of Airco,

Inc., in December, 1973. If this is correct, the acquisition occurred long after Big Three had supplied the subject data to the Commission. Accordingly, Big Three's response could not have been in conjunction with a Commission investigation concerning the captioned cause, or in connection with adjudicative action pertaining thereto. Accordingly, the data submitted by Big Three is neither relevant nor material to such cause. Big Three should have the right to contest as not relevant or material to this proceeding any document and all data it supplied in connection with File No. 741 0005. Big Three respectfully submits that Respondents' request for access to such information should be denied, and that an order should be entered prohibiting complaint counsel from disclosing to Respondents any documents, responses, or other data furnished by Big Three to the Commission in File No. 741 0005.

III.

In the alternative, and only in the event it is determined that some of the data so submitted by Big Three should be made available to Respondents in connection with adjudication of the captioned cause, Big Three respectfully submits that the following protective relief should be granted:

A. Pursuant to Commission Rule 3.45, all such data and documentation submitted by Big Three should be made subject

to an in camera order, and should not be made public; further, Respondents' counsel should be permitted to review such documentation for the sole, limited purpose of utilizing same in this adjudication, and should be prohibited from making copies thereof. Big Three has previously expressly advised the Commission that disclosure of such documentation and information to its competitors would be most harmful to Big Three. Respondents, particularly Airco, are competitors of Big Three; and

B. An order should be entered directing that only counsel of record herein may review such documentation, and that Respondents, non-parties, and other counsel be prohibited from reviewing same; and

C. An order should be entered directing that the following matters be excised or deleted from all data submitted by Big Three prior to its examination by Respondents' counsel:

1. All names of Big Three's customers;
2. All contract prices, amounts and volumes;
3. All information pertaining to volume and value of industrial gas produced by Big Three;
4. All information pertaining to the capacity to produce industrial gas possessed by any

and all of Big Three's facilities;

5. All information pertaining to processes, formulas or procedures utilized by Big Three in the production of industrial gas;
6. All information pertaining to Big Three's sales of industrial gas;
7. All information pertaining to the cost to Big Three of producing industrial gas;
8. All information pertaining to Big Three's plans for expanding or reducing its production and/or distribution of industrial gas;
9. All information concerning the cost of constructing any of Big Three's plants or other facilities.

IV.

In connection with this Application, counsel for Big Three respectfully requests permission to appear and be heard at the pretrial conference to be conducted on April 17, 1974.

WHEREFORE, PREMISES CONSIDERED, counsel for Big Three Industries, Inc. respectfully requests that the Administrative Law Judge enter an order (a) denying Respondents' application for access to documentation and data previously furnished by Big Three to the Commission in connection with File No. 741

0005, such order to prohibit complaint counsel from disclosing to Respondents or their counsel any of such documentation or, in the alternative, for entry of orders expressly granting the protective relief set forth in III A, B and C, above; and for an order granting Big Three's counsel leave to appear and be heard at the pretrial conference on April 17, 1974.

Respectfully submitted,

Willis Witt

Willis Witt
510 Gulf Building
Houston, Texas 77002

223-4151

Counsel for Big Three Industries, Inc.

APRIL 11, 1974

OF COUNSEL:

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1100 Keith Building

Cleveland, Ohio 44115

J. M. ULMER (1908-1972)
J. M. BERNE (1905-1981)
B. D. GORDON (1905-1952)
C. R. BERNE (1909-1966)

(216) 621-0400

April 9, 1974

The Hon. Ernest G. Barnes
Administrative Law Judge
Federal Trade Commission
Sixth Street at Pennsylvania Ave., N.W.
Washington, D. C. 20580

Re: Docket No. 8955
British Oxygen Company, Ltd., et al.

Dear Judge Barnes:

Enclosed please find the Motion of Burdett Oxygen Co. of Cleveland, Inc. ("Burdett"), not a party in the above matter, for a Protective Order, submitted upon being advised of the motion of BOC respondents for a subpoena duces tecum for the production of confidential material heretofore delivered by Burdett to the Federal Trade Commission.

In response to the demands of the Federal Trade Commission, Burdett turned over proprietary and business information of a highly confidential nature, the disclosure of which would be detrimental and damaging to the company, especially if placed in the hands of its competitors, most of whom are much larger and economically much more powerful.

Included among the information which was disclosed are copies of confidential reports filed with the Bureau of the Census, and which we have been advised are deemed to be privileged under federal law.

These were disclosed to the FTC after being advised that the basic books and reports from which the reports were prepared would be subpoenaed at the trial. The company felt compelled to comply with this request because its business is so thinly staffed with executive and administrative personnel, as compared with other and more significant factors in the industry, that the burden of responding to such subpoenas would constitute an extreme hardship to the company and its employees, and a blow to its business endeavors. Burdett is, by comparison with

the respondents and with other major manufacturers in the compressed gas industry, a small regional manufacturer operating primarily in Ohio and neighboring states.

We feel that the confidential information disclosed to the FTC should not under any circumstance be revealed to a competitor or potential competitor, or to any representative of same. We are fearful that even a protective order limiting disclosure to non-operating personnel would be inadequate. The burden of pursuing its legal remedies against larger and more powerful competitors would likely be so costly as to cause it irreparable injury and render it substantially without an adequate remedy. We also believe that none of the material submitted by Burdett can have any measurable effect on the issues of this case.

Accordingly, we respectfully urge that the material submitted by Burdett not be made available to any representative of the respondents or of any other compressed gas manufacturer.

Very truly yours,

Jordan C. Band

1/rk

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED.	Docket No. 8955

MOTION OF BURDETT OXYGEN CO. OF CLEVELAND, INC. FOR PROTECTIVE ORDER

ULMER, BERNE, LARONGE, GLICKMAN & CURTIS
Attorneys for Movant
Burdett Oxygen Co. of Cleveland, Inc.
1100 Keith Building
Cleveland, Ohio 44115 621-8400

Jordan C. Band

Of Counsel

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED.	Docket No. 8955

TO: HONORABLE ERNEST G. BARNES
Administrative Law Judge

MOTION OF BURDETT OXYGEN CO. OF CLEVELAND, INC. FOR PROTECTIVE ORDER

Movant, Burdett Oxygen Co. of Cleveland, Inc., objects to the Motion of BOC Respondents for Subpoena Duces Tecum insofar as it pertains to the production of documents submitted by Movant to the Federal Trade Commission ('FTC") and moves for an order that the FTC not produce said documents on the grounds that said documents contain secret and confidential operating information concerning Movant's sales, production and distribution of industrial gases, the disclosure of which would cause great and irreparable competitive harm and injury to Movant within the industrial gas industry.

In the alternative, if the Court determines that limited discovery should proceed, Movant requests an order that:

a. The documents be made available for inspection only by a disinterested person designated by the Court to summarize the information contained therein;

b. No document shall be reproduced or copied in any manner;

c. No document or information extracted therefrom may be made available to any operating personnel of any Respondent.

d. Any information extracted from said documents shall not be used for business or competitive purposes, but solely by trial counsel in the necessary preparation of the defense.

e. The documents shall be held by the Administrative Judge, under seal, with access thereto being permitted only upon order of the Administrative Judge and by the person so designated by him.

BRIEF

Respondents The British Oxygen Company, Limited ("BOC"), BOC Financial Corporation, BOC Holdings, Limited and British Oxygen Investments, Limited (collectively the "BOC Respondents") have moved for the issuance of a subpoena duces tecum requiring production of documents in the possession of the FTC. The documents sought are those which the FTC had requested from various

companies, including Movant, incident to an investigation of the industrial gases industry. In compliance with demands of the FTC, Movant supplied certain secret and confidential documents concerning its sales, production and distribution of industrial gases within the industry. BOC Respondents, competitors of Movant, now seek disclosure of those documents which, if allowed, would cause irreparable competitive harm and injury to Movant within the industrial gases industry.

In the action presently before the Commission, the FTC, pursuant to various provisions of the Antitrust Laws, is attacking the proposed acquisition by BOC Respondents of certain shares of stock of Airco, Inc. on the grounds that to allow the acquisition would substantially lessen competition, tend to create a monopoly and/or result in an unreasonable restraint of trade in the industrial gases industry within the United States. Movant, although a competitor within the industrial gases industry, is not a party to the action and, therefore, to allow BOC Respondents' Motion would result in their gaining access to confidential information concerning Movant's operations which, conceivably, could result in future competitive gain to BOC Respondents and irreparable competitive harm and injury to Movant. Accordingly, Movant objects to BOC Respon-

dents' Motion and seeks, by an order, protection of its confidential documents presently in the possession of the FTC.

In support of Movant's position, it is clear that where a court is satisfied in a particular case that the need for discovery is not greater than the compelling need to maintain the secrecy and confidentiality of certain commercial information, it may make an order that such information not be disclosed. Korman v. Mobile, 184 F. Supp. 928 (W.D. Mich. 1960); DeLong Corp. v. Lucas, 138 F. Supp. 805 (S.D. N.Y. 1956); Gordon, Wolf, Cowen Co. v. Independent Halvah & Candies, 17 Fed. Rul. Serv. 34.621 (S.D. N.Y. 1952).

Even if a need for disclosure is determined to be present, it is equally clear that a court may make such orders as may be necessary to protect the confidentiality and secrecy of the information sought to be disclosed. Such orders have specifically been granted in cases where, as in the instant action, it was necessary to protect witnesses not parties to the suit from general disclosure to competitors of information and documents concerning pricing. [Uinta Oil Refining Co. v. Continental Oil Co., 36 F.R.D. 176 (D. Utah 1964); Covey Oil Co. v. Continental Oil Co., 340 F 2d. 993 (10th Cir. 1965)], sales and profits [United States v. Lever Bros. Co., 193 F. Supp. 254 (S.D. N.Y. 1961); Boeing Airplane Co. v. Coggeshall, 280

F 2d. 654 (D.C. Cir. 1960)], and other "trade secrets" [Boeing Airplane Co. v. Coggeshall, supra].

With regard to the foregoing, courts have limited disclosure and/or protected the confidentiality of commercial information by granting the following orders:

> That information may be disclosed to counsel only and that counsel not divulge the information to their clients. Printing Plate Supply Co. v. Curtis Publishing Co., 11 Fed. Rul. Serv. 33.319 (E.D. Pa. 1967)).
>
> That no copies or reproduction of documents be allowed and that the information contained therein not be used for any purpose other than preparation of the defense. United States v. American Optical Co., 39 F.R.D. 560 (N.D. Cal. 1966); United States v. Lever Bros, 193 F. Supp. 254 (S.D. N.Y. 1961).
>
> That the documents be held under seal with access thereto only upon order of the judge. Covey Oil Co. v. Continental Oil Co., 340 F 2d. 993 (10th Cir. 1965).
>
> That disclosure be limited to a disinterested third person who would reveal only final figures and/or comparisons without revealing underlying data. United Parcel Serv. v. Federated Dep't. Stores, Inc., 19 Fed. Rul. Serv. 34.62 (E. Del. 1953); American Crystal Sugar Co. v. Cuban-American Sugar Co., 23 Fed. Rul. Serv. 26b.31 (S.D. N.Y. 1956).

Accordingly, in light of the foregoing, Movant respectfully requests an order protecting the disclosure of the documents presently in the possession of the FTC and denying BOC Respondents' Motion; or, in the alternative, if it is de-

termined that limited discovery should proceed, Movant respectfully requests an order that said documents (1) be made available only to a disinterested person, (2) not be copied or reproduced, (3) be held under seal with access thereto permitted only upon order of the Administrative Judge and (4) that any information extracted from said documents not be disclosed for any business or competitive purpose.

Respectfully submitted,

ULMER, BERNE, LARONGE, GLICKMAN & CURTIS

By _____
Jordan C. Band

Attorneys for Movant
Burdett Oxygen Co. of Cleveland, Inc.
1100 Keith Building
Cleveland, Ohio 44115 621-8400

Dated: Cleveland, Ohio
April 9, 1974

A 173

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202 833-8400

March 29, 1974

Honorable Ernest Barnes
Assistant Chief Judge
Federal Trade Commission
Star Building
Washington, D. C. 20580

Re: Docket Number 8955

Dear Judge Barnes:

On behalf of our client Chemetron Corporation, we wish to record our objection to the request made by British Oxygen and Airco for the production of certain Chemetron documents in the possession of the Federal Trade Commission. As you are aware, the Federal Trade Commission obtained numerous statements and documents from Chemetron pursuant to a letter of access dated August 20, 1973. These documents were submitted to the Commission voluntarily on the understanding that they would not be disclosed to competitors of Chemetron. Obviously, disclosure to British Oxygen and Airco falls outside of that understanding.

Since the information provided by Chemetron is clearly of a confidential nature, British Oxygen and Airco should not be entitled to examine those documents. Moreover, I have been advised by Mr. Purcell that the Commission's staff does not plan to utilize any of the information provided by Chemetron in support of its complaint against British Oxygen and Airco. In view of this, there would appear to be no necessity for British Oxygen or Airco to examine our documents.

KIRKLAND & ELLIS

If a prehearing conference is scheduled on this question, we would appreciate the opportunity to restate our position. By copy of this letter, I am asking Mr. Purcell to keep us informed of the place and time of such a prehearing conference.

Sincerely yours,

John P. Lynch

JPL/jlb

cc: Donald Purcell
George J. Wade, Esq.
Jay H. Topkis, Esq.

A 175

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March 21, 1974

The Honorable Ernest G. Barnes
Administrative Law Judge
Federal Trade Commission
101 Pennsylvania Avenue, N.W.
Room 7117
Washington, D. C. 20580

Re: In the Matter of British Oxygen Company, Limited et al
DOCKET NO. 8955

Dear Judge Barnes:

We are attorneys for Liquid Air Corporation of North America (LA Corp.). In response to a written request for information received from the Federal Trade Commission, LA Corp.has, in writing, answered an extensive questionnaire and has submitted to the FTC copies of numerous documents dealing with LA Corp.'s operations in the industrial gas business in the U.S. Most of this material is of an extremely sensitive nature and serious damages to the business of LA Corp. and its subsidiaries can result if this material is disclosed to competitors. All of the material was submitted to the FTC on the understanding that all such material would be kept confidential and not disclosed in any proceeding without first advising us as attorneys for LA Corp. of such possible disclosure so that we would have an opportunity to take such steps as are necessary to protect the confidentiality of the material.

In accordance with our understanding with the FTC, we have been advised that a subpoena duces tecum may soon be issued requiring the FTC to deliver such material to British Oxygen Company, Limited for their review in connection with the above matter. In connection therewith, we respectfully request that

1. before Your Honor signs any such subpoena, we be given an opportunity to be heard on the question of whether such subpoena should be issued; or

2. before Your Honor renders any decision concerning the validity of the subpoena duces tecum on any motion which might be filed with respect thereto, we be heard on such motion with respect to the material supplied by LA Corp.; or

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March 21, 1974

The Honorable Ernest G. Barnes
Administrative Law Judge
Federal Trade Commission

Re: British Oxygen Company, Limited
et al - Docket No. 8855

3. before any subpoena or order with respect thereto is entered requiring the FTC to produce such material, we be heard on behalf of LA Corp. with respect to the granting of a protective order which will insure the confidentiality of the material; or

4. LA Corp. be granted such other and further relief as may seem just and proper in the circumstances.

Very truly yours,

E. A. Dominianni

EAD:mfh

cc: Mr. W. E. Dempster (LA Corp.)
405 Lexington Avenue
New York, New York 10017

Gordon Youngwood, Esq.
Federal Trade Commission
6th Street and Pennsylvania Ave., N.W.
Washington, D. C. 20580

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April 2, 1974

The Honorable Ernest G. Barnes
Administrative Law Judge
Federal Trade Commission
1101 Pennsylvania Avenue, N.W.
Room 7117
Washington, D. C. 20580

Re: In the Matter of British Oxygen Company, Limited, et al
Docket No. 8955

Dear Judge Barnes:

This letter will confirm the substance of our telephone conversation during which I advised you that this firm, on behalf of Liquid Air Corporation of North America, will submit to you, on or before April 12, 1974, a detailed memorandum giving reasons why the issuance of the subpoena duces tecum in the form requested by British Oxygen Company would be completely inappropriate in this case. We believe that the documents which have been voluntarily submitted by Liquid Air Corporation of North America to the FTC are of an extremely sensitive nature and disclosure thereof to a competitor would jeopardize the future operations of Liquid Air Corporation of North America.

We understand further that Your Honor will decide all questions connected with the issuance of the subpoena, including possible protective orders, only after consideration of memoranda to be submitted by the various parties on or before April 12, 1974.

Very truly yours,

E. A. Dominianni

EAD:mfh

cc: Messrs: Gordon Youngwood, Federal Trade Commission
Jay H. Topkis, Paul Weiss
George Wade, Shearman & Sterling
P. A. Salbaing
W. E. Dempster
M. F. N. Prendergast

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	:	
BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED.	:	Docket No. 8955

OPPOSITION OF LIQUID AIR, INC. TO BOC RESPONDENTS' MOTION FOR SUBPOENA DUCES TECUM

COUDERT BROTHERS
Attorneys for Liquid Air, Inc.
200 Park Avenue
New York, New York 10017
(212) 973-3300

E. A. Dominianni
James M. Rhodes

Of Counsel

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of		
BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED.	:	Docket No. 8955

To: The Honorable Ernest G. Barnes,
Administrative Law Judge

OPPOSITION OF LIQUID AIR, INC.
TO BOC RESPONDENTS' MOTION FOR
SUBPOENA DUCES TECUM

Liquid Air, Inc. ("Liquid Air"), not a party in this proceeding, through its counsel, appears specially and hereby opposes the motion of British Oxygen Company, Limited ("BOC") and other BOC respondents for issuance of a subpoena duces tecum requiring production of certain documents by the Federal Trade Commission ("the Commission"). In the event any such disclosure or production is ordered, Liquid Air requests a stay of such disclosure or production of any Liquid Air documents in order to permit a petition to the Commission to prohibit such disclosure, or for a protective order, or for other appropriate relief.

On August 22, 1973, Liquid Air received a letter dated August 20, 1973 from the staff of the Bureau of Competition of the Commission, specifying 34 broad requests for voluntary production of information in connection with the Commission's investigation of trade practices in the industrial gas industry, as well as requesting direct access to Liquid Air files containing 18 specified categories of documents (File No. 741 0005).* Liquid Air undertook to cooperate with such request for voluntary production of documents and information, upon the express understanding that all such information produced to the Commission would receive confidential treatment and handling.

Thereafter, Liquid Air supplied information in response to the Commission's aforementioned 34 requests by letters dated September 13, 1973 and November 15, 1973. It also permitted access by the Commission staff to certain of

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* The breadth of the requests has been recognized by Complaint Counsel:

> "The specifications contained in the voluntary requests for information and for access to company files that were employed by the Commission staff in the course of its ongoing investigation of the industrial gas industry were by necessity designed to be general and extensive." (Complaint Counsel's Opposition to BOC Respondents' Motion for Subpoena Duces Tecum at 5).
>
> * * *
>
> "The specifications in the prior Commission voluntary requests . . . were as previously mentioned broad and extensive. The scope of the specifications in the Commission voluntary requests were particularly broad. Those specifications were designed to be comprehensive, and accordingly embraced broad general categories of information." (at 6-7).

its files, located at its corporate offices, and from which files the Commission attorneys designated certain documents for copying. Copies of such documents were duly made and forwarded to the Commission. (All of such documents and information thus voluntarily furnished by Liquid Air to the Commission is referred to hereinafter as "the Liquid Air material".)

On February 26, 1974, the Commission issued a complaint in the instant proceeding, challenging a proposed acquisition of a portion of the capital stock of Airco, Incorporated by BOC.

Subsequently, on March 19, 1974, counsel for BOC moved for the issuance of a subpoena duces tecum to the Commission requiring the production of certain documents and information by the Commission from its investigatory files, including certain of the Liquid Air material. Specifically, the subpoena would call for the production of certain books, papers and documents described in five specifications, including the following:

> "1. Each document produced by any company during the Commission's investigation of the industrial gas industry pursuant to items 1 through 5, 9, 13, 14, 16 through 18, 24, 32, and 33 of the Commission's requests for the production of documents in that investigation, a sample of which is attached hereto as Exhibit A.
>
> "2. Each document obtained by the Commission during the course of its investigation of the industrial gas industry pursuant to items 1 through 3, 6 through 8, 10,

11, and 14 through 16 of the Commission's request for access to files appearing at pages 6 and following of Exhibit A hereto."

The foregoing specifications would require the production by the Commission of much of the Liquid Air material, which was only produced to the Commission voluntarily on the understanding that it would be accorded confidential treatment. In particular, Specification 1 would require disclosure and production to BOC of certain of the Liquid Air information compiled from confidential business records and provided in response to the Commission's requests, while Specification 2 would require disclosure and production of certain of the documents selected by the Commission staff after receiving the requested access to Liquid Air files. Certainly it was never envisioned by Liquid Air that any of the material thus voluntarily produced in a spirit of cooperation with the Commission might be surrendered to its competitors.

This prospect of disclosure is viewed with grave concern by the management of Liquid Air, since the subject documents and information are extremely sensitive. In the first instance, the request for subpoena which would compel such disclosure does not satisfy the minimum requirements regarding relevance, specificity and reasonableness. As noted in Complaint Counsel's Brief in Opposition to Issuance of the Subpoena Duces Tecum, the BOC respondents' request is deficient in light of Rule 3.36 of the Procedures and Rules

of Practice of the Commission. Thus, there is a threshold question concerning whether the request is even properly drawn. This is particularly true in light of the statement by Complaint Counsel that it has no intention of using any of the documents contained in its investigatory files for any purpose at the trial of this case (Complaint Counsel's Brief at 12).

Much more significant, however, are the disastrous anti-competitive consequences which would result from disclosure of the Liquid Air material. As noted hereinabove, the Liquid Air material which would be called for by the subpoena consists either of (i) information submitted in response to certain specific requests, which was compiled from confidential documents and sources, or of (ii) confidential documents selected for copying by the Commission staff. Such confidential information and documents are accorded the most stringent confidential treatment by Liquid Air under company practice, being maintained under strict security with extremely limited rights of access. Such handling is necessary in order to prevent unauthorized disclosure and attendant harm to the company.

Correspondingly, disclosure of either the Liquid Air information or documents under this subpoena would result in even more direct and serious harm. With respect

to the information submitted which would be disclosed under Specification 1 of the subpoena, examples of such irreparable competitive harm are legion. For instance, the subpoena would compel production of capacity and cost data provided under requests 1 and 2. Since facts relating to unit cost of production and capacity, to a significant extent, control marketing policy in specific markets and affect pricing, such information would serve to disclose vital, desirable data which would be extremely valuable and useful from the point of view of a competitor, as opposed to a litigant in an anti-merger proceeding. Similar and equally sensitive data would be disclosed from production of the reports supplied under the Commission requests 32 and 33, which reports receive the most confidential handling from the governmental agencies involved. On the other hand, if the BOC respondents really require such information for the industry as a whole, it is our belief that such aggregate information is available from the Department of Commerce.

Similarly, disclosure of Liquid Air documents would cause great competitive harm if produced under Specification 2 of the proposed subpoena, as is evident from a listing of the categories of documents which could be included under the respondents' subpoena:

> "1. Activities and policies of your company relating to the production and marketing of industrial gas.

"2. The production and marketing actions of other (including potential) producers and distributors of industrial gas products.

3. Marketing actions of your company relating to other producers of industrial gas and/or their distributors.

* * *

"6. Analysis of national or regional markets in the industrial gas industry.

7. Reports or information provided to and/or received from each and all extra company production or marketing research organization.

8. Plans for expanding or reducing the company's production and/or distribution of industrial gas products.

* * *

"10. Construction of pipelines to distribute industrial gas products.

11. Tendering bids, by your company and other producers of industrial gas products, to customers purchasing industrial gas products by pipeline.

* * *

"14. Return on investment, stockholders equity, and net sales for each industrial gas product.

15. Construction of each plant producing industrial gas products.

16. Acquisitions and/or joint ventures relating to the production, distribution, and sale of industrial gas products."

Documents produced under the foregoing include prospective plans respecting market studies, operational plans, customer evaluations and sales and pricing analyses and

statistics. Such documents would disclose competitive plans and facts which would not only be rendered valueless with disclosure, but would cripple Liquid Air indefinitely as a viable competitor to such large firms as Airco.

In brief, disclosure or production of the Liquid Air material in the form provided to the Commission would do great competitive harm by permitting executives of respondents in this proceeding to peruse and examine sensitive data, as well as to gain intimate working knowledge of the competitive plans and programs of Liquid Air, thus crippling Liquid Air as a competitive force in the industrial gas market. This seems to be an anomolous result in an anti-merger proceeding designed to prohibit and cure structural concentration. Such disclosure would serve to effectively disarm Liquid Air for the foreseeable future; its preparations and studies would be rendered worthless with disclosure and its investment in them would be irretrievably lost. Correspondingly, disclosure of sensitive capacity and cost information and other production data would have a chilling effect on competition which Liquid Air might have otherwise been able to offer. Respondents should not be permitted to obtain by subpoena valuable competitive information which, in the exchange, becomes valueless to Liquid Air and, moreover, works considerable harm.

Nowhere in the material submitted by the BOC respondents is there set forth particular reasons and the need for

access by BOC to such competitively sensitive material. If market summaries, overall sales data, general locations or production facilities and other general industry-wide statistical data is required, BOC should be required to make a showing of need for such material relating to individual competitors as distinguished from overall compilations of industry data. The rationale for BOC's course of action to the contrary seems clear. The action by the Commission in this case has given BOC a tailor-made opportunity to gain access to information on and documents of industrial gas competitors in the United States which BOC could otherwise never assemble, even with a battery of economic investigators working full time for years.

Therefore, while we recognize BOC's right to broad discovery in this very important matter, its request goes far beyond what would be normally classified as extraordinary. BOC intends to gain competitive advantage by its motion. Accordingly, care must be taken to protect the property of competitors.

BOC is no stranger to the industrial gas business. It has knowledge of plant capacities, desirable plant locations, and market practices common in the industry. In addition, BOC has available all of the operational expertise of Airco executives. Surely, Airco executives are knowledgeable with respect to common business practices existing in the industry.

It is impossible to understand how information respecting Liquid Air plant capacities and marketing strategies will be helpful to BOC in this proceeding. To the contrary, with such information, BOC will not advance its defense to the FTC complaint, but will substantially enhance its competitive position.

In light of this, Liquid Air must oppose disclosure of its material in its present form, and urges that the request of the BOC respondents for issuance of a subpoena duces tecum be denied.

In the alternative, and since the Administrative Law Judge has discretion to provide terms and provisions for the production of materials under a subpoena duces tecum (see Procedures and Rules of Practice of the Commission §§ 3.33(d), 3.36(c)), Liquid Air requests that a hearing be held to ascertain whether practicable alternative methods to disclosing such information are available. At the minimum, it is the position of Liquid Air that the following safeguards be adopted in a protective order governing confidential treatment of its material in this proceeding:

1.) BOC be required to establish that the data of particular companies is necessary rather than compilations of industry statistics. To the extent and in the likely event such burden is not met, then at BOC's expense the following should be observed;

2.) furnishing of confidential data of all companies in the industry to a disinterested accounting firm

for compilation of details in the aggregate to insure against separate disclosure of the separate data of Liquid Air or any other company;

3.) placing all information called for by the subpoena in a confidential file to be maintained at the Commission under strict security during the course of this proceeding and allowing review of the material only in such location by the independent accounting firm performing the compilation; and

4.) discussion of details by the independent accountants to be limited to counsel of record for the respondents only with respect to market summaries.

Pending resolution of these matters and further hearing upon them, Liquid Air urges:

1.) that Complaint Counsel be prohibited from disclosing or producing any material of Liquid Air to the respondents;

2.) that in the event of any order of the Administrative Law Judge permitting disclosure or production of Liquid Air material, that Liquid Air be so notified and given five working days to petition the Commission to prohibit such disclosure, or for a protective order, or for other appropriate relief, with such notification to include written specification of the documents and material proposed to be disclosed or produced; and

3.) that, provided Liquid Air shall petition the Commission as provided in (2), that disclosure or production of any Liquid Air material shall be stayed until ten days after the Commission rules on such petition.

For the foregoing reasons, counsel for Liquid Air request that the motion of BOC respondents for issuance of a subpoena duces tecum be denied in its entirety.

Respectfully submitted,

/s/ E. A. Dominianni

E. A. Dominianni

April 11, 1974

/s/ James M. Rhodes

James M. Rhodes

Counsel for Liquid Air, Inc.

A 190

LIQUID CARBONIC CORPORATION
Subsidiary of Houston Natural Gas Corporation
135 SOUTH LASALLE STREET • CHICAGO, ILLINOIS 60603

R. W. DUDLEY
VICE PRESIDENT &
GENERAL COUNSEL

April 11, 1974

Honorable Ernest Barnes
Administrative Law Judge
Federal Trade Commission
Washington, D. C. 20580

Re: In the Matter of British Oxygen Company, Limited, DKT. No. 8955

Dear Judge Barnes:

We have been informed that certain of the Respondents in the above proceeding have filed a motion for the issuance of a subpoena duces tecum directed to the Federal Trade Commission to obtain documents submitted to the Commission by third parties. The purpose of this letter is to express the opposition of Liquid Carbonic Corporation, one such third party, to this motion.

1. The information sought was voluntarily submitted on a confidential basis. By letter from the Federal Trade Commission dated August 31, 1973, Liquid Carbonic Corporation was requested to furnish information and documents responsive to thirty-two specifications. Although most of the material sought was extremely confidential business information, in the nature of trade secrets, voluntary compliance with

this request was made on December 7, 1973. If Respondents' motion is granted, all materials responsive to twenty-one of the specifications, and materials responsive to three additional specifications, will be disclosed to Respondents, who are competitors of Liquid Carbonic Corporation.

The confidential business information submitted to the Commission, and now sought by Respondents, included information as to production capacities, plant capacity, total dollar volumes of sales of specified products and volume of sales to specific classes of trade. Because of the confidential nature of this information, it was submitted on the understanding that it would be given confidential treatment. Our counsel's transmittal letter, a copy of which is attached hereto, pointed out that "preserving the confidentiality of strategic information is particularly significant in the light of the fact that Liquid Carbonic Corporation is a very small factor in this industry attempting to establish a viable market position, which effort would be severely injured if its larger competitors, accidentally or otherwise, obtained access to its confidential information." This prospect of competitive injury will become a reality if Respondents' motion is granted. Considerations such as the above have led the Commission and the courts to protect third party sales information from disclosure to competitors. See, e.g., F.T.C. v. Continental Can Company, 267 F. Supp. 713, 716 (S.D. N.Y. 1967).

Release of the materials will not only injure Liquid Carbonic Corporation, but will also impair the public interest in the gathering of information. For if Respondents are given access to the materials voluntarily produced by Liquid Carbonic Corporation, we, and no doubt a number of other companies, will be extremely reluctant to comply with any future Commission informational requests. This overriding public interest was recognized by the Commission in Texas Industries, Inc., Dkt. 8656, 1965-1967 CCH Trade Reg. Rep. para. 17,253,

wherein a respondent's motion for the production by the Commission of reports submitted by third parties was denied (at 22,352):

> The Commission's ability to conduct a sound and comprehensive industry-wide inquiry in the cement industry and complete it with reasonable expedition is likely to be seriously impaired by releasing the Special Reports obtained in the inquiry for use in adjudicative proceedings such as the present one. Such release would be likely to engender resistance on the part of the companies filing the reports to further requests or demands by the Commission for information, and to seriously retard voluntary and constructive collaboration between the Commission and the industry in obtaining facts and data necessary to the industry-wide inquiry. For much of the information contained in these Reports is highly confidential, and the parties filing the Reports would be extremely reluctant to see such information find its way into the hands of competitors, or into the public record of this adjudicative proceeding. The substantial cooperation the Commission has received from the reporting companies reflects in part, we have reason to believe, their expectation and understanding that these Reports would not be released for the use sought in the present motion for production.

The same considerations dictate that Respondents' pending motion be denied.

Beyond general policy considerations, there is also an express statutory prohibition against disclosure of information of the type involved here. Section 6 of the Federal Trade Commission Act, which empowers the Commission to conduct investigations of the kind involved here, also prohibits the publication

of "trade secrets and names of customers." (15 U.S.C. § 46 (F)). The information involved here comes within the trade secret category, for, as the case law has recognized, a trade secret "may consist of any formula, pattern, device or compilation of information which gives him an opportunity to obtain an advantage over competitors who do not know or use it." Future Plastics, Inc. v. Ware Shoals Plastics, Inc., 340 F. Supp. 1376, 1383 (D.S.C. 1972). Certainly the information disclosed by Liquid Carbonic Corporation, involving as it does sales and production data, falls within this accepted definition of trade secrets.

The entry of a protective order would not serve to protect Liquid Carbonic Corporation's interests. We of course do not mean to impugn the integrity of Respondents' counsel; however, it is an unfortunate fact that materials thought to be safeguarded by protective orders have in the past been innocently spread of record through sheer inadvertence. Liquid Carbonic Corporation should not have to assume this risk.

2. Respondents' motion does not satisfy the requirements of the Commission's Rules of Practice. The applicable Commission Rule, § 3.36(b), states that a motion for the production of documents held by the Commission "shall contain a statement showing the general relevance of the material, information, or testimony and the reasonableness of the scope of the application, together with a showing that such material, information, or testimony is not available from other sources by voluntary methods or pursuant to §§ 3.33 - 3.34." Respondents have failed to satisfy any of these requirements.

With respect to relevance, Respondents make no effort to explain in what respect documents called for by its proposed specifications have a bearing on this proceeding. Instead, they make the conclusory and cryptic assertion that the relevancy "cannot be questioned, as we are seeking only that which complaint counsel have already determined is relevant and are seeking far less than complaint counsel have deemed reasonable." (Respondents' Motion, p. 3) In fact

much of the information involved, e.g. sales to industrial accounts (specification 4 of Exhibit A to the Motion), sales to distributors (specification 5), and exchange agreements and volumes (specifications 13 and 14), appears to be wholly irrelevant to the issues of this litigation. Surely Rule 3.36 contemplates a more substantial showing of relevance than Respondents have provided.

We respectfully request a copy of the Order disposing of the pending motion be served upon us.

Sincerely,

LIQUID CARBONIC CORPORATION

By _____
Robert W. Dudley
Vice President & General Counsel

RWD/jb

cc: Jay H. Topkis, Esq.
K. Keith Thurman, Esq.

A 195

LAW JUDGES TREATED AS MOTION

E. E. G. Barnes

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APR 10 1974
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W. SAMUEL WOODARD

MAX E. JUSTICE
WILLIAM L. RICARD, JR.
FRED T. LOWRANCE
FRED C. THOMPSON

AREA CODE 704
372-0730

April 9, 1974

RECEIVED
APR 11 1974
SECRETARY

Mr. Charles A. Tobin
Secretary of The Federal Trade Commission
Federal Trade Commission
Washington, D. C. 20580

Re: In the Matter of British Oxygen Company, Limited et al, Docket No. 8955 - Subpoena of Documents by British Oxygen Company, Limited

Dear Mr. Tobin:

We have been informed by your office that British Oxygen Company has subpoenaed certain documents furnished by National Welders Supply Company, Inc. to Mr. Donald B. Purcell of the Bureau of Competition, Federal Trade Commission on October 19, 1973.

When this information was originally produced to the Federal Trade Commission by National Welders, the documents were produced with the understanding by letter from Mr. Purcell dated September 11, 1973 that such information would be kept confidential by the Commission and that the Commission's own regulation, i.e., §4.10 (a)(2) of the Federal Trade Commission Organization, Procedures and Rules of Practice, states that

> "Trade secrets and commercial or financial information obtained from a person are privileged or confidential."

National Welders hereby objects to the release of such information to British Oxygen or any other party to the above-referenced action on the ground that all of such information is confidential and that release of such information to British Oxygen, which is a competitor of National Welders, would be highly detrimental to National Welders' interests and would allow British Oxygen to obtain an unfair competitive advantage over National Welders.

In particular, all of the financial information, including profit and loss statements, sales data, sales to principal distributors, price schedules, summaries of purchases from other principal

and summaries of costs of construction and production at National Welders' Hopewell, Virginia plant, as well as specific contracts between National Welders and its customers and suppliers would place British Oxygen in an unfair competitive position, in that it could determine the strength of National Welders' financial position, its costs of doing business, its share of the market in certain areas, the identity of its distributors and the prices and other terms at which British Oxygen must sell in order to undercut National Welders and take its customers. The information concerning quality control is also confidential information concerning the processes by which National Welders produces its products and certainly should not be revealed to competitors.

We therefore respectfully request on behalf of National Welders Supply Company, Inc. that all of the information submitted by National Welders to the Federal Trade Commission on October 19, 1973 be kept confidential and not released to British Oxygen or any of the parties to the above-referenced matter without an order of court. Please advise us as to the outcome of this matter in case there should be any further developments.

Sincerely yours,

Fred T. Lowrance

Fred T. Lowrance
Attorney for National Welders Supply Company, Inc.

FTL:jc

cc: The Honorable Ernest G. Barnes
Administrative Law Judge
Federal Trade Commission
Washington, D. C. 20580

BEST COPY AVAILABLE

A 197

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OAKLAND, CALIFORNIA 94609

ALDO P. GUIDOTTI
RAYMOND E. MELLANA
CHARLES A. LEE

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TELEPHONE 652-0772

Federal Trade Commission
Washington, D.C. 20580

Attn: Charles A. Tobin, Secretary

Re: Third-party objection to subpena duces tecum
Docket No. 8955
In the matter of BRITISH OXYGEN CO., et al.
Your File No. 741 0005
Our client: Pacific Oxygen Company

Gentlemen:

We represent Pacific Oxygen Company, which supplied a number of documents to the Bureau of Competition in September, 1973 after its president, William Josephian, was served with a subpena to appear at the FTC. A good faith effort was made to fully supply all information desired.

We were advised by telephone on April 5, 1974 by Mr. Rhett Krulla of your agency that the documents submitted by our client are the subject of a subpena in the British Oxygen Co. matter and the FTC is resisting the subpena.

We would like to join the FTC in objecting to the subpena because the subject documents provide a detailed picture of most aspects of Pacific Oxygen's business and revealing this information could put it at a competitive disadvantage. As stated in our letter of September 21, 1973 which accompanied the documents, they were submitted in strict confidence.

In the event that the ruling compels compliance with the subpena, our client would desire a protective order limiting inspection of the subject documents to the counsel for the parties (with any attorneys who are also officers or directors of the parties being excluded).

Thank you for your consideration of this matter.

Respectfully submitted,

GUIDOTTI and MELLANA

By _____
ALDO P. GUIDOTTI

Approved:
PACIFIC OXYGEN COMPANY

By _____
WILLIAM JOSEPHIAN

cc: Honorable Ernest Barnes

WALD, HARKR ER & ROSS

ROBERT L WALD
WM WARFIELD ROSS
DONALD H GREEN
THOMAS C MATTHEWS JR
GEORGE A AVERY
TERRENCE ROCHE MURPHY
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TELEX: 248591

A 198

March 15, 1974

Gordon Youngwood, Esquire
Attorney
Bureau of Competition
Federal Trade Commission
Washington, D. C. 20580

Re: File No. 741 0005

Dear Mr. Youngwood:

We request immediate staff assurance that no confidential Union Carbide documents the subject of the Commission's letter of January 9, 1974, in File No. 741 0005, be turned over to BOC until there is a final Commission ruling on the requests of Union Carbide Corporation contained in the attached letter to the Commission.

Sincerely yours,

Robert L. Wald

Robert L. Wald

Alexander W. Sierck

Alexander W. Sierck

Counsel for
Union Carbide Corporation

cc: Hon. Ernest G. Barnes
Administrative Law Judge

Enclosure

FEDERAL TRADE COMMISSION

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A 199

March 15, 1974

Charles A. Tobin, Esquire
Secretary
Federal Trade Commission
Washington, D. C. 20580

Re: British Oxygen Company, Limited, et al., Docket No. 8955

Dear Mr. Tobin:

We are advised that British Oxygen Company, Limited (BOC), respondent in the above-captioned matter, has filed with the Administrative Law Judge a request for issuance of a subpoena requiring complaint counsel to produce copies of all documents received by the Commission in the course of its ongoing investigation of trade practices in the industrial gas industry (File No. 741 0005). We are also advised that at the instance of the Administrative Law Judge counsel for BOC and complaint counsel are meeting today to discuss, in lieu of a subpoena, voluntary production by complaint counsel of materials covered in BOC's subpoena request.

The materials sought by BOC under its subpoena request include documents supplied the Commission by Union Carbide in the course of the investigation in File No. 741 0005. Union Carbide has designated many of these documents as confidential and has received the assurance of the Commission, by letter dated January 9, 1974 (copy attached), that these documents, subject to certain exceptions not here applicable, would accordingly be given confidential status.

Thus, in its letter of January 9, 1974, the Commission stated that those materials designated as

confidential by Union Carbide would not be disclosed "to any person other than a member of the Federal Trade Commission, its staff, or an outside consultant without first giving Union Carbide notice of its intention and affording the company ten (10) days within which to respond." The letter further stated that if Union Carbide filed an objection and the Commission nevertheless decided that the public interest required disclosure, it would not make such disclosure "until ten (10) days after Union Carbide is notified of the Commission's determination."

We consider these assurances absolutely binding upon any voluntary agreement on the part of the staff to provide BOC with any documents or information designated as confidential by Union Carbide. We ask the Commission's confirmation that the procedure specified in the Commission's letter of January 9, 1974, will be followed with respect to any such voluntary agreement.

In addition, we submit that the Commission's assurances of confidentiality with respect to Union Carbide documents produced in File No. 741 0005 limit the power of the Administrative Law Judge to issue a subpoena in Docket No. 8955 requiring production of such documents. We therefore ask that the Commission direct the Administrative Law Judge to certify to it, for ruling under the procedures set forth in the Commission's letter of January 9, 1974, any application for a subpoena in Docket No. 8955 which would require production of confidential Union Carbide documents furnished the Commission staff in File No. 741 0005.

In making this request, we wish to stress that we do not here assert that confidential Union Carbide materials are immune from production in Docket No. 8955. We do assert, however, that the conditions for production of such materials have been fixed by

the Commission in its letter of January 9, 1974, and these conditions must be observed by the staff in any voluntary production which it may make or by the Administrative Law Judge in determining the terms and conditions for production under any subpoena issued by him.

Very truly yours,

Robert L. Wald

Robert L. Wald

Alexander W. Sierck

Alexander W. Sierck
Counsel for
Union Carbide Corporation

Of counsel:

Robert L. Doan, Esquire
Assistant General Counsel
Union Carbide Corporation
270 Park Avenue
New York, New York 10017

Enclosure

cc: Chairman Lewis A. Engman
Commissioner Paul Rand Dixon
Commissioner Mary E. Hanford
Commissioner Mayo J. Thompson

Hon. Ernest G. Barnes

Gordon Youngwood, Esquire

COPY

FEDERAL TRADE COMMISSION
Washington, D. C. 20580

Office of the Secretary

202

Robert L. Doan, Esquire
270 Park Avenue
New York, New York 10017

January 9, 1974

Re: File No. 741 0005

Dear Mr. Doan:

This is in response to your request on behalf of Union Carbide Corporation for confidential treatment of certain portions of the information that was requested in a letter dated August 20, 1973, from Gordon Youngwood, staff attorney of the Bureau of Competition, to W.S. Sneath, President of Union Carbide Corporation. In a letter dated October 16, 1973, to Mr. Youngwood, and at a recent conference with the Commission's staff, you requested that Union Carbide be given advance notice by the Commission of any determination by it to disclose information specified as confidential in your letter of October 16, 1973.

Under Section 10 of the Federal Trade Commission Act, any officer or employee of the Commission who, without authority of the Commission, unless directed by a court, makes public any information obtained by the Commission is guilty of a misdemeanor and subject to criminal sanctions. Accordingly, you may be assured that the information will be given the fullest protection against disclosure afforded by the Statute, the Rules of Practice, and the Commission's customary procedure with regard to the security of confidential information.

Additionally, the Commission, subject to the exceptions set out below, will not disclose the information specified as confidential in your letter of October 16, 1973, to any person, other than a member of the Federal Trade Commission, its staff or an outside consultant who is bound by the Commission's requirements with respect to the nondisclosure of confidential records, without first giving Union Carbide notice of its intention and affording the company ten (10) days within which to respond. If your company files an objection to disclosure and the Commission decides that the public interest requires disclosure of the documents or information, the Commission will not disclose the documents or information until ten (10) days after Union Carbide is notified of the Commission's determination.

This procedure, however, will not apply to the Commission's furnishing information to a committee or subcommittee of Congress pursuant to Section 4.11(c) of the Commission's Rules of Practice. However, if any of the specified material is requested by a committee or subcommittee of Congress, the Commission, prior to furnishing such materials, will give Union Carbide Corporation immediate notice of such request in order to allow Union Carbide Corporation an opportunity to apprise the committee or subcommittee of the confidential nature of the requested material. Moreover, if the Commission grants the Congressional request, the Commission itself will advise the committee or subcommittee that Union Carbide Corporation considers the material to be highly confidential.

The above notice provisions will not apply to any information which (1) is now in the public domain; (2) enters the public domain from a source other than the Commission or its employees; (3) was in the Commission's possession prior to disclosure to the Commission by Union Carbide Corporation; (4) is supplied to the Commission or its employees by a third party lawfully in possession thereof; or (5) is supplied to the Commission in response to compulsory process. Nothing in the foregoing sentence, however, will constitute a waiver by Union Carbide Corporation of any restrictions imposed by law on the Commission's use of any such information, however obtained.

The foregoing assurances are given with the understanding that in the event of issuance of an adjudicative complaint in this matter, the confidential status of the specified information and the limitations on its disclosure shall be governed solely by the applicable provisions of the Commission's Rules of Practice, Part 3 - Rules of Practice for Adjudicative Proceedings.

By direction of the Commission.

Charles A. Tobin
Secretary

Attachment

COPY

A 204

MAR 19 1974
SECRETARY

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED.	)	Docket No. 8955

To: The Honorable Ernest G. Barnes,
Administrative Law Judge

APPLICATION OF UNION CARBIDE CORPORATION
FOR PROTECTIVE RELIEF

Union Carbide Corporation, not a party in this proceeding, through its counsel, appears specially and hereby applies to the Administrative Law Judge for an order granting it protective relief, as hereinafter set forth, with respect to the production in this proceeding of Union Carbide documents supplied by Union Carbide to the Commission in the course of the staff investigation in File No. 741 0005. As grounds for this application, counsel for Union Carbide states as follows:

(1) Union Carbide has voluntarily produced numerous documents requested by the Commission staff and has agreed to produce other such documents in connection with the Commission's investigation of trade practices in the industrial

gas industry, File No. 741 0005. By letters dated October 16, 1973, and November 6, 1973, and in subsequent discussions with the Commission staff pertaining thereto, counsel for Union Carbide stated that many of these documents were confidential to a degree that required Union Carbide to seek assurances of the Commission that the Commission would give Union Carbide prior notice of, and an opportunity to be heard on its objection to, any disclosure of such information to third parties.

(2) By letter dated January 9, 1974, the Commission stated that those materials designated as confidential by Union Carbide as above provided would not be disclosed "to any person other than a member of the Federal Trade Commission, its staff, or an outside consultant . . . without first giving Union Carbide notice of its intention and affording the company ten (10) days within which to respond." The letter further stated that if Union Carbide filed an objection and the Commission nevertheless decided that the public interest required disclosure, it would not make such disclosure "until ten (10) days after Union Carbide is notified of the Commission's determination."

(3) On March 15, 1974, counsel for Union Carbide formally requested that the Commission (a) confirm that the notice procedures of its letter of January 9, 1974, will be followed with respect to any voluntary agreement for the production of such confidential Union Carbide documents entered into between complaint counsel and counsel for respondents in this proceeding, and (b) direct the Administrative Law Judge to certify to it, for ruling under the procedures set forth in the Commission's letter of January 9, 1974, any application for a subpoena herein which would require production of such confidential Union Carbide documents furnished the Commission staff in File No. 741 0005. On the same date, counsel for Union Carbide requested that complaint counsel give immediate assurances that the Commission staff would not turn over to respondents any such confidential Union Carbide documents until there was a final Commission ruling on Union Carbide's request of March 15, 1974.

(4) No ruling has yet been received from the Commission with respect to Union Carbide's request of March 15, 1974, and complaint counsel has informally advised Union Carbide's counsel that the staff cannot give any

assurances that Union Carbide documents will not be disclosed to respondents herein prior to a final Commission ruling on Union Carbide's request.

(5) Thus, unless immediate protective relief is given Union Carbide by the Administrative Law Judge, Union Carbide is confronted with the possibility that confidential documents furnished in File No. 741 0005 may yet be disclosed in this proceeding without affording Union Carbide the protections set forth in the Commission's letter of January 9, 1974.

(6) Moreover, other documents submitted by Union Carbide that were not covered by the Commission's letter of January 9, 1974, were nonetheless submitted on the understanding that they were still subject to Commission Rules 4.10(a)(2) and 4.10(a)(5). Therefore, Union Carbide should have the opportunity to contest as not relevant to issues involved in this proceeding any document it has supplied to the Commission in the course of the staff investigation in File No. 741 0005.

WHEREFORE, counsel for Union Carbide requests that the Administrative Law Judge enter an order (a) prohibiting complaint counsel from disclosing to respondents documents

furnished by Union Carbide to the Commission in File No. 741 0005 without 10 days' prior notice to Union Carbide of complaint counsel's intention to disclose such documents, and (b) requiring respondents to serve upon counsel for Union Carbide a written copy of any application for a subpoena or other demand for Union Carbide documents at the same time as such demand is served upon complaint counsel, and affording Union Carbide 10 days thereafter within which to respond.

Respectfully submitted,

Robert L. Wald

Alexander W. Sierck
Counsel for
Union Carbide Corporation

March 19, 1974

Of counsel:
Robert L. Doan, Esquire
Assistant General Counsel
Union Carbide Corporation
270 Park Avenue
New York, New York 10017

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WALD, HARKRADER & ROSS

A 209

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AREA CODE 202
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TELEX: 248591

April 5, 1974

Delivered by Hand
4-5-74
4:30 P.M.

Honorable Ernest G. Barnes
Administrative Law Judge
Federal Trade Commission
Washington, D. C. 20580

Re: British Oxygen Company, Limited et al., Docket No. 8955

Dear Judge Barnes:

By letter of January 9, 1974 (copy attached), the Commission granted confidential treatment for certain documents voluntarily produced by Union Carbide Corporation in the course of the Commission's investigation of the industrial gas industry (File No. 741 0005). With exceptions not here relevant, the Commission's letter provides that information in those confidential documents will not be disclosed to anyone other than a member of the Federal Trade Commission, its staff or an outside consultant who is bound by the Commission's non-disclosure requirement without giving Union Carbide notice of the Commission's disclosure intentions, a period of ten (10) days within which to respond, and, if the Commission nonetheless decides that the public interest requires disclosure, an additional ten (10) days after notifying Union Carbide of such decision.

Subsequently, on February 26, 1974, the Commission issued its complaint in the above-referenced separate matter, challenging the proposed acquisition of a portion of the capital stock of AIRCO by British Oxygen Company (BOC). On March 19, 1974, Respondent

BCC moved for a subpoena duces tecum requiring complaint counsel to produce a number of documents from the Commission's files, including some documents submitted to the Commission by Union Carbide in the course of the Commission's investigation of the industrial gas industry (File No. 741 0005) and subject of the Commission's assurance of confidentiality.

As the result of a prehearing conference held March 28, 1974 in Docket No. 8955, we are advised that complaint counsel, on April 12, 1974, may voluntarily produce certain of the documents requested by BOC in its subpoena but will resist production of other documents on various grounds, including the confidential nature of the latter documents. We are further advised that you anticipate ruling on the BOC subpoena on April 8, 1974, and will rule on any objections by Union Carbide or other third parties on April 17, 1974, or thereafter.

In order to assure compliance with the assurance of confidentiality as stated in the Commission's letter of January 9, 1974, Union Carbide requests an order requiring:

A) With respect to any Union Carbide documents that complaint counsel may propose to disclose voluntarily,

1) That complaint counsel be prohibited from voluntarily producing or disclosing any such documents prior to April 17, 1974.

2) That in the event any disclosure or production is proposed or ordered on April 17, 1974, or thereafter, Union Carbide shall be so notified and shall be given five (5) working days to petition the Commission to prohibit

disclosure, or for a protective order, or for other appropriate relief. Notification shall include written specification of the documents proposed to be disclosed or produced.

3) That production or disclosure of any such documents shall be stayed five (5) working days following notification under A(2), supra, and, provided Union Carbide petitions the Commission within the five (5) day not fication period, production or disclosure of any such documents shall be stayed until ten (10) days after the Commission rules on any such petition.

B) With respect to any Union Carbide documents described in Respondent BOC's Motion for Subpoena Duces Tecum filed March 19, 1974,

1) That complaint counsel be prohibited from producing or disclosing any such documents prior to April 17, 1974.

2) That in the event production or disclosure of any documents is proposed or ordered, Union Carbide shall be so notified and shall be given five (5) working days to petition the Commission to prohibit disclosure, or for a protective order, or for other appropriate relief. Notification shall include written specification of the documents proposed to be disclosed or produced.

3) That production or disclosure of any such documents shall be stayed for five (5) days following notification under B(2), supra, and, provided Union Carbide petitions the Commission within the five (5) day notification

period, production or disclosure of any documents shall be stayed until ten (10) days after the Commission rules on any such petition.

Very truly yours,

Robert L. Wald

Robert L. Wald

Alexander M. Sierck

Alexander M. Sierck

Richard A. Brown

Richard A. Brown
Counsel for
Union Carbide Corporation

Of counsel:

Robert L. Doan, Esquire
Assistant General Counsel
Union Carbide Corporation
270 Park Avenue
New York, New York 10017

Enclosure

cc: Jay H. Topkis, Esquire
George V. Wade, Esquire
Henry Sailer, Esquire
K. Keith Thurman, Esquire

A 213

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OF THE SECRETARY

Robert L. Doan, Esquire
270 Park Avenue
New York, New York 10017

Re: File No. 741 0005

Dear Mr. Doan:

This is in response to your request on behalf of Union Carbide Corporation for confidential treatment of certain portions of the information that was requested in a letter dated August 20, 1973, from Gordon Youngwood, staff attorney of the Bureau of Competition, to W.S. Sneath, President of Union Carbide Corporation. In a letter dated October 16, 1973, to Mr. Youngwood, and at a recent conference with the Commission's staff, you requested that Union Carbide be given advance notice by the Commission of any determination by it to disclose information specified as confidential in your letter of October 16, 1973.

Under Section 10 of the Federal Trade Commission Act, any officer or employee of the Commission who, without authority of the Commission, unless directed by a court, makes public any information obtained by the Commission is guilty of a misdemeanor and subject to criminal sanctions. Accordingly, you may be assured that the information will be given the fullest protection against disclosure afforded by the Statute, the Rules of Practice, and the Commission's customary procedure with regard to the security of confidential information.

Additionally, the Commission, subject to the exceptions set out below, will not disclose the information specified as confidential in your letter of October 16, 1973, to any person, other than a member of the Federal Trade Commission, its staff or an outside consultant who is bound by the Commission's requirements with respect to the nondisclosure of confidential records, without first giving Union Carbide notice of its intention and affording the company ten (10) days within which to respond. If your company files an objection to disclosure and the Commission decides that the public interest requires disclosure of the documents or information, the Commission will not disclose the documents or information until ten (10) days after Union Carbide is notified of the Commission's determination.

BEST COPY AVAILABLE

This procedure, however, will not apply to the Commission's furnishing information to a committee or subcommittee of Congress pursuant to Section 4.11(c) of the Commission's Rules of Practice. However, if any of the specified material is requested by a committee or subcommittee of Congress, the Commission, prior to furnishing such materials, will give Union Carbide Corporation immediate notice of such request in order to allow Union Carbide Corporation an opportunity to apprise the committee or subcommittee of the confidential nature of the requested material. Moreover, if the Commission grants the Congressional request, the Commission itself will advise the committee or subcommittee that Union Carbide Corporation considers the material to be highly confidential.

The above notice provisions will not apply to any information which (1) is now in the public domain; (2) enters the public domain from a source other than the Commission or its employees; (3) was in the Commission's possession prior to disclosure to the Commission by Union Carbide Corporation; (4) is supplied to the Commission or its employees by a third party lawfully in possession thereof; or (5) is supplied to the Commission in response to compulsory process. Nothing in the foregoing sentence, however, will constitute a waiver by Union Carbide Corporation of any restrictions imposed by law on the Commission's use of any such information, however obtained.

The foregoing assurances are given with the understanding that in the event of issuance of an adjudicative complaint in this matter, the confidential status of the specified information and the limitations on its disclosure shall be governed solely by the applicable provisions of the Commission's Rules of Practice, Part 3 - Rules of Practice for Adjudicative Proceedings.

By direction of the Commission.

Charles A. Tobin
Secretary

Attachment

LAW OF
WALD, HARKRADER & ROSS

ROBERT L. WALD
WM. WARFIELD ROSS
DONALD H. GREEN
THOMAS C. MATTHEWS JR.
GEORGE A. AVERY
TERRENCE ROCHE MURPHY
STEPHEN M. TRUITT
JAMES K. WHITE
JAMES DOUGLAS WELCH
THOMAS W. BRUNNER
GREER S. GOLDMAN
GERALD B. WETLAUFER
CAROL KINSBOURNE

CARLETON A. HARKRADER
STEPHEN B. IVES, JR.
SELMA M. LEVINE
JOEL E. HOFFMAN
ALEXANDER W. SIERCK
WILLIAM R. WEISSMAN
TONI K. GOLDEN
KEITH S. WATSON
ROBERT A. SKITOL
C. COLEMAN BIRD
MARK SCHATTNER
RICHARD A. BROWN

OF COUNSEL
PHILIP ELMAN
NEAL P. RUTLEDGE

1320 NINETEENTH STREET, N. W., WASHINGTON, D. C. 20036

AREA CODE 202
296-2121
CABLE ADDRESS: WALRUS
TELEX: 248591

April 18, 1974

Honorable Ernest G. Barnes
Administrative Law Judge
Federal Trade Commission
Washington, D. C.

Re: British Oxygen Company, Limited
et al, Docket No. 8955

Dear Judge Barnes:

Prior to yesterday's prehearing conference, Robert Saylor, counsel for Air Products, and I agreed upon the text of a proposed protective order covering the documents subject to the BOC subpoena request. Mr. Saylor furnished you, complaint counsel, and counsel for respondents copies of the proposed order at yesterday's prehearing conference. It is my recollection that, save for certain minor points, counsel for BOC stated on the record that he found the text of the order acceptable.

After the prehearing conference, I stated that I planned to submit to you promptly a slightly revised version of the proposed order. A copy of the order is enclosed, the revisions being marked by hand in the text for ease of identification.

Mr. Saylor has not reviewed the text of this revision. However, he has authorized me to state that he agrees with the expansion of paragraph 9 to include intended disclosure by complaint counsel on the public record of all documents received from

third parties in the course of the investigation in FTC File No. 741 0005.

Very truly yours,

Alexander W. Sierck

Richard A. Brown
Counsel for Union Carbide Corporation

Of Counsel:

Robert L. Doan, Esquire
Assistant General Counsel
Union Carbide Corporation
270 Park Avenue
47th Floor
New York, New York 10017

cc: K. Keith Thurman, Esquire
Robert Saylor, Esquire
Jay H. Topkis, Esquire
George J. Wade, Esquire
James M. Rhodes, Esquire
John P. Lynch, Esquire
Willis Witt, Esquire

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED.	)	DOCKET NO. 8955

PROTECTIVE ORDER RESPECTING RELEASE OF DOCUMENTS SUBMITTED TO THE COMMISSION BY CERTAIN CORPORATIONS NOT PARTIES TO THIS PROCEEDING

Under authority of sections 3.21 and 3.42 of the Commission's Rules of Practice and consistent with the terms of the Order issued this date on the Motion of BOC Respondents for a Subpoena Duces Tecum:

IT IS ORDERED THAT:

1. Until further order of the Administrative Law Judge or upon order of the Federal Trade Commission, and except in accordance with the terms of this Order, there shall not be any disclosure to any individual of the documents listed in paragraph 3 below. This prohibition, and the procedures specified hereinafter, shall not apply to any disclosure made to the Federal Trade Commission or any of its officers, employees, administrative law judges, or consultants subject to statutory obligation to maintain confidentiality of information.

2. Any documents subject to this Order, or the information learned therefrom, shall be used only for purposes of this proceeding and for no other purpose.

3. The documents subject to this Order are those documents mentioned in the Order issued this date in respect to the Motion of BOC Respondents for a Subpoena Duces Tecum.

4. The documents and information subject to this Order shall be revealed only to the following categories of "qualified persons": (i) designated individual outside counsel of record engaged in the preparation for trial of this proceeding for the respondents parties, including designated associate attorneys and stenographic and clerical employees assisting such counsel, and (ii) designated individual experts not employed by, consultants to, or otherwise affiliated with the respondents parties who are assisting counsel in the preparation of this proceeding for trial.

5. Any The documents and information subject to this Order shall be made available only to qualified persons who shall have read this Order and who shall agree to maintain said information in confidence and not to use or reveal the same to anyone (including attorneys or other personnel employed by the law firms representing respondents, other than the specifically designated persons in the litigation departments referred to in paragraph 4 herein. of those firms) except in accordance with this Order, and not to use the same except in connection with the trial or preparation for trial of this proceeding,

except that nothing shall prevent disclosure beyond the terms of this Order prior to trial if the supplying party claiming confidentiality consents in writing to such disclosure.

6. All documents and information subject to this Order, and notes or other records regarding the contents thereof, shall be maintained in the custody of designated outside counsel to the parties, and no partial or complete copies thereof shall be retained by anyone else at any other location than the offices of outside counsel or the offices of complaint counsel.

7. The requirements of paragraph 5 above shall be satisfied with respect to each designated expert and each designated outside counsel only upon their agreement in writing to be bound by the terms of this Order prior to their receipt of these documents in the following form:

> "I hereby acknowledge that I [name], [position of employment], am about to receive confidential information supplied to the Federal Trade Commission by [ ]. I certify that my understanding is that such information is to be provided to me pursuant to the terms and restrictions of the Protective Order of [date] in British Oxygen Company, Limited, et al., FTC Docket Docket No. 8955, and that I have been given a copy of and have read said Order and agree to be bound by the terms thereof. I understand that such information and any copies I make of this material or any notes or other records that may be made regarding any of such information shall not be disclosed to others, except pursuant to the terms of said Order."

Counsel for each respondent party shall maintain a list of the names of all persons to whom documents subject to this Order are disclosed.

8. Upon final termination of this proceeding, counsel for respondents the parties shall assemble and return to each supplying person all documentary material and memoranda embodying information subject to this Order, including all copies of such memoranda or documentary material, but not including any notes or other attorney's work product that may have been placed thereon by counsel for the receiving party.

9. Upon notice to the supplying party concerned of the intention of counsel for respondents and/or FTC complaint counsel of-record to disclose a document subject to this Order on the public record, the supplying party shall, within ten days after receiving such notice, state whether he objects to disclosure. In the event that objection is made, counsel for the party desiring to make disclosure and the supplying party shall make a good faith effort to resolve the objection. Said effort shall be completed within five days after objection was made. Failing such resolution, if the third party wishes to pursue its objection, within ten days after completion of efforts to reach a resolution, the supplying party shall seek a protective order of the Administrative Law Judge, which shall be granted for good cause shown.

Whether used to obtain discovery in investigation or FTC No. 0005

10. To the extent that an application for a protective order involves a request for in camera treatment

within the scope of section 3.45 of the Rules of Practice, the disposition of such request will be governed by the provisions of that rule. However, in no event will respondents, as distinguished from their counsel, be entitled to view in camera any information subject to this Order. Nor may respondents oppose in camera treatment for any of this information.

11. As used herein, the term "document" includes any extract therefrom or summary thereof.

Administrative Law Judge

Dated:

April 5, 1974

Mr. Ernest Barnes
Administrative Law Judge
Federal Trade Commission
Washington, D.C. 20580

ATTENTION: Charles A. Tobin, Secretary

REFERENCE: Dockett #[illegible]
British Oxygen Company, Limited

Dear Sir:

In a conversation today with Mr. Rhett Krulla from the Bureau of Competition, I was informed that information I sent to Mr. Krulla in December of 1973 is being subpoenaed by the British Oxygen Company. I was assured that any information I sent would be held in strictest confidence. For this reason, I am definitely opposed to anyone outside the Federal Trade Commission having access to the information I sent.

Very truly yours,

WHITMORE OXYGEN COMPANY

Richard K. Dillard
Vice-President, Manager

RKD:am

WHITMORE OXYGEN COMPANY
P. O. BOX 2099 • SALT LAKE CITY, UTAH 84110 • PHONE 363-4421

pursuant to Items (a) and (b) of BOC respondents' Specifica-

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED.	)	Docket No. 8955 ORAL ARGUMENT REQUESTED

TO: THE FEDERAL TRADE COMMISSION

APPLICATION FOR INTERLOCUTORY APPEAL OF ADMINISTRATIVE LAW JUDGE'S RULE

On April 26, 1974, Chemetron was advised that Administrative Law Judge Barnes had ordered complaint counsel to produce certain Chemetron documents now in the possession of the Federal Trade Commission to attorneys for British Oxygen (BOC) and Air Reduction (Airco).[1/] Chemetron has been further advised that the Administrative Law Judge's order permits third parties affected by his ruli[illegible] appeal directly to the Federal Trade Commission.

In an August 20, 1973 letter, the Federal Trade Commission requested Chemetron Corporation to produce certain documents and verified statements. The documents

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1/ Chemetron Corporation has not been served with a copy of the ruling.

were to be supplied in connection with an investigation of the industrial gases market by the Federal Trade Commission. Chemetron Corporation did submit such documents voluntarily. On March 19, 1974, counsel for BOC and Airco moved for a subpoena duces tecum requesting that complaint counsel be ordered to turn over all documents gathered by the Commission in the course of its industrial gases market investigation.

On March 28, 1974, counsel for Chemetron appeared before Administrative Judge Barnes to voice objection to the wholesale disclosure of Chemetron's documents to two of its competitors. Although the breadth of the subpoena originally requested by respondents has been narrowed, the Administrative Judge's ruling will permit BOC and Airco to examine certain documents containing highly confidential business information. Included among the documents ordered produced are confidential production figures, confidential sales figures, pricing information, contract proposals and contract documents.

The Administrative Judge's ruling flies in the face of the requirements of the Rules of Practice of the Federal Trade Commission. Section 3.34(b) of those rules requires an applicant for a subpoena to demonstrate "the general relevancy of the material and the reasonableness of the scope of the subpoena". As complaint counsel will

undoubtedly demonstrate more fully in their application for review, BOC and Airco have made no such showing. Indeed, the Administrative Judge has not required such a showing. It is clear that the documents covered by the order could not be subpoenaed directly from Chemetron Corporation without a preliminary showing of relevance. See, e.g., Spier v. Home Insurance Company, 404 F.2d 896 (7th Cir. 1968). The fortuitous fact that these documents were turned over to the Federal Trade Commission -- in connection with a wholly unrelated investigation -- should not be held to waive Chemetron's rights forever.

The Administrative Judge's order also ignores the fact that Chemetron has expressed its willingness to cooperate with counsel for BOC and Airco. Chemetron has already permitted respondents' counsel to talk with officers of Chemetron regarding certain issues relevant to this proceeding. In addition, Chemetron has offered to work out some form of compromise on their document request. Most of the information sought by items 1, 2, 3, 4, 13, 14 and 16 of Specification 1 and by items 10, 11 and 16 of Specification 2 can be provided to BOC and Airco in a form that will protect Chemetron from a business standpoint. Despite Chemetron's offer, counsel for BOC and Airco appear unwilling to finalize such a procedure. Obviously, the failure of counsel to seek the information

by voluntary means should stand in bar of a subpoena. Rule 3.36(b), Rules of Practice, Federal Trade Commission.

Finally, mention should be made as to the likely practical effect of Judge Barnes' ruling. The Commission and its staff can hardly expect voluntary cooperation from corporations in the future if confidential documents are turned over to competitors without a showing of "compelling circumstances". Such a result would necessarily frustrate the investigative functions of the Federal Trade Commission.

Respectfully submitted,

JOHN P. LYNCH

Kirkland & Ellis
2900 Prudential Plaza
Chicago, Illinois 60601
312-726-2929
Counsel for Chemetron Corporation

DATED: April 29, 1974

A 227

COPY

KIRKLAND & ELLIS
PRUDENTIAL PLAZA
CHICAGO, ILLINOIS 60601
TELEPHONE 312 726-2929

April 29, 1974

Mr. Charles A. Tobin, Secretary
Federal Trade Commission
Washington, D. C. 20580

Re: Docket No. 8955

Dear Mr. Tobin:

Enclosed are the original and 19 copies of Chemetron Corporation's application for review in the above-captioned matter. Copies have been served on complaint counsel and counsel for respondents.

Sincerely yours,

John P. Lynch

JPL/jlb

Enclosures

cc: James M. Rhodes, Esq.
Robert N. Sayler, Esq.
Alexander W. Sierck, Esq.
Jay H. Topkis, Esq.
George Wade, Esq.
Willis Witt, Esq.
Gordon Youngwood, Esq.

A 228

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

FEDERAL TRADE COMMISSION
RECEIVED
APR 25 1974
SECRETARY

In the Matter of BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED,	DOCKET NO. 8955

COMPLAINT COUNSEL'S APPLICATION FOR REVIEW OF ORDER REQUIRING PRODUCTION OF DOCUMENTS FROM THE COMMISSION FILES

Pursuant to Section 3.23(a)(1) of the Commission's Rules of Practice, complaint counsel hereby apply for review of an order issued by Judge Barnes on April 23, 1974, which requires production of documents from the investigatory files of the Federal Trade Commission. Judge Barnes issued the order pursuant to a subpoena request filed by British Oxygen Company, Ltd. ("BOC"), BOC Financial Corporation, BOC Holdings, Ltd., and British Investments, Ltd., ("BOC respondents").

At a pretrial hearing on April 25, 1974, Judge Barnes at the request of complaint counsel stayed his order until the Commission rules upon this application. Complaint counsel however request that the Commission consider this application as soon as possible as the trial in this proceeding is scheduled to commence on May 6, 1974.

Judge Barnes' order of April 23, 1974, should be set aside for two reasons. First, Judge Barnes erroneously concluded that it was unnecessary for BOC respondents to attempt to obtain the documents they requested from the Commission's files from other sources by voluntary and compulsory means as is expressly required by Section 3.36 of the Commission's Rules. Second, BOC respondents have not shown a compelling need for the confidential data which Judge Barnes has ordered produced from the Commission's files.

Complaint counsel are required by Judge Barnes' order to produce documents obtained by the Commission staff in the course of its ongoing investigation of the industrial gas industry. The Commission staff was in the midst of an investigation of the structure, conduct and performance of the industrial gas industry and the firms therein when the acquisition of 35 percent of Airco's stock by BOC giving rise to this proceeding took place. The documents ordered by Judge Barnes to be produced contain information as to sales, production, plant capacities, customers, prices and rates of return of industrial gas companies in the United States. The Commission staff had obtained these documents pursuant to voluntary requests for information and voluntary requests for access to company files.

On March 19, 1974, three weeks after the complaint issued in this case BOC respondents filed a motion for issuance of a subpoena requiring production of documents obtained by the Commission staff as a result of its industrial gas investigation. In their motion BOC respondents made no attempt to comply with the requirements of Section 3.36 of the Commission's Rules for seeking production of documents from the files of the Commission. See "Complaint Counsel's Opposition to BOC Respondents' Motion for Subpoena Duces Tecum" filed March 25, 1974.

At a subsequent pretrial hearing on March 28, 1974, Judge Barnes permitted counsel for BOC respondents to attempt by an oral presentation to comply with the relevancy requirements of Section 3.36. It was clear from the oral presentation made by BOC respondents' counsel at the hearing that many of the requested subpoena specifications of BOC respondents were wholly irrelevant to this case. BOC respondents' requested subpoena also failed as required by Section 3.36 to specify as exactly as possible the documents to be produced. See "Complaint Counsel's Supplemental Memorandum in Opposiiton to BOC Respondents' Motion for Subpoena Duces Tecum" filed April 1, 1974.

In fact, Judge Barnes in his order struck approximately half of the subpoena specifications requested by BOC respondents on the grounds that those specifications lacked the relevancy and specificity required by Section 3.36. Moreover, it should be noted that Judge Barnes states in his order that he liberally construed BOC respondents' subpoena requests. Judge Barnes also pointed out to BOC respondents' counsel at the pretrial hearing on March 28, 1974, that the motion of BOC respondents additionally failed to show as required by Section 3.36 that the documents requested of the Commission were not available from other sources by voluntary or compulsory means. Counsel for BOC respondents

conceded in his response that BOC respondents had contacted only one company, Liquid Air, Inc., and that Liquid Air had declined their invitation. */ BOC respondents' counsel did not even indicate which particular documents Liquid Air was unwilling to provide.

Accordingly, Judge Barnes was unable to find that BOC respondents had satisfied the Section 3.36 requirement that respondents first exhaust third party sources before seeking production of documents from the Commission. However, Judge Barnes determined that as "the Commission has made a recent investigation of the industrial gas industry and has readily available clearly identifiable and highly relevant documentary evidence which may be useful to respondents, the requirement that respondents first exhaust third-party sources before seeking documents in the Commission's possession would unnecessarily delay the trial of this matter. "**/ Judge Barnes therefore concluded that, as the Commission and the United States District Court for the District of Delaware had ordered that this proceeding be expedited, BOC respondents should not be required to comply with the requirement of Section 3.36 that third-party sources first be exhausted. Complaint counsel submit that this conclusion was in error.

By his order, Judge Barnes has amended Section 3.36 of the Commission's Rules. Under his ruling the requirement of Section 3.36 that third party sources first be exhausted will never apply in cases such as the present one where the Commission obtains a preliminary injunction and concomitantly expedites the administrative proceeding. The adoption of such a rule is not only unnecessary but would in complaint counsel's view be unwise.

There is no justification for BOC respondents not to have contacted every company that submitted to the Commission the documents requested in BOC respondents' subpoena. The subpoena of BOC respondents as drafted requests documents submitted to the Commission by only four companies. ***/

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*/ Pretrial Hearing of March 28, 1974 (Topkis, Tr. at 46).

**/ Order ruling on motion of BOC respondents for a Subpoena Duces Tecum, April 23, 1974, at 8 (emphasis in original).

***/ Those four companies are Union Carbide Corporation, Air Products and Chemicals Corporation, Chemetron Corporation, and Liquid Air, Inc. These companies and respondent Airco are the five largest industrial gas producers in the United States.

Their subpoena requests documents obtained by the Commission pursuant to itemized requests contained in a voluntary request for information and access to company files that was sent in the course of the industrial gas investigation by the Commission staff to respondent Airco. In addition to documents submitted by Airco, which documents are not requested by BOC respondents, only four other companies submitted documents pursuant to the particular itemized requests incorporated by BOC respondents in their subpoena specifications. BOC respondents contacted one of those four companies, Liquid Air, Inc., and clearly could have contacted the other three.

In addition to the itemized requests sent by the Commission staff to Airco and four other companies, the Commission staff also sent other forms of requests for information to approximately 10 other companies. Even assuming that BOC respondents' subpoena was simply inartfully drafted and that BOC respondents intended to also request the documents submitted by these other companies, there is no plausible explanation for them not having contacted those ten companies.

By March 19, 1974, the date BOC respondents filed their motion to subpoena documents from the Commission's files, BOC respondents could easily have contacted each company and requested it to voluntarily produce documents. BOC respondents should not have requested on March 19, 1974, the issuance of a subpoena directed at the Commission, but rather, should have requested issuance of subpoenas to whichever of those companies, if any, were unwilling to provide documents voluntarily. BOC respondents chose to ignore the express requirements of Section 3.36 and to seek documents directly from the Commission's files. Their reason for doing so is quite clear. It is their implicit position that, because the Commission obtained a preliminary injunction against them, the Commission must pay a price-- the Commission must disregard its rules and open its investigatory files for their perusal.

Section 3.36 requires that BOC respondents show that the documents they have requested from the Commission are not available from other sources by voluntary and compulsory means. Even though this case is being expedited BOC respondents have had more than two months to attempt to obtain the requested documents from others. They did not do so. They therefore cannot show, as Section 3.36 requires, that the documents are not available from third parties. Had BOC respondents made an earnest effort by voluntary and compulsory means to obtain the requested documents from third parties and had at this juncture

still not acquired some of the documents they needed, then they could make the showing required by Section 3.36.

Judge Barnes should not have waived the requirement of Section 3.36 that third party sources first be exhausted; there was no reason to have done so. He should have required BOC respondents to make a serious effort under the circumstances to obtain the requested documents from other sources. Section 3.36 does not require that BOC respondents acquire the requested documents from other sources. It does require that BOC respondents show that under the circumstances they are unable to obtain the documents except from the Commission. BOC respondents cannot make such a showing in this instance because they made a sham of attempting to obtain the documents from others. No one can seriously suggest that contacting one company out of 14 in two months time can be considered an earnest attempt to obtain documents from third parties.

BOC respondents have also failed to show a compelling need for the documents that Judge Barnes has ordered produced from the Commission's investigatory files. The information contained in those documents as explained below is in extremely sensitive form. Assuming arguendo that BOC respondents may need some of this information for their defense, they clearly do not need any of the information in the highly confidential form in which it was submitted. Had BOC respondents requested this information from third parties as they should have, those parties would have had the option of providing BOC respondents the requested information in a less sensitive form or of having the sensitive Commission documents turned over. BOC respondents opted instead to circumvent the Commission's Rules and deny the third parties that choice.

Judge Barnes permitted third parties to file objections to turning over to BOC respondents the documents the parties had submitted to the Commission. Ten companies filed written objections and six of the ten companies appeared at the pretrial conference on March 28, 1974, and voiced their objections. Counsel for Chemetron Corporation stated at the hearing that attorneys from the law firm representing BOC respondents were that very moment holding a two day meeting with officials of Chemetron to discuss the likely testimony of those officials in the trial of this case. Chemetron's counsel stated that it was inexplicable why BOC respondents were not using the opportunity of that two day meeting to request documents directly from Chemetron instead of seeking the documents from the Commission files.

Counsel for Union Carbide stated at the pretrial conference that Union Carbide was more than willing to discuss and negotiate with BOC respondents their request for documents. In fact, complaint counsel has been informed that Union Carbide Corporation is so adamently opposed to BOC respondents being given access to the highly confidential form of information in the Commission's files that Union Carbide has initiated negotiations with BOC respondents on behalf of all the industrial gas companies concerned. Air Products and Chemicals, Inc. also stated in its written submission to Judge Barnes that had BOC respondents requested documents directly from third parties individual negotiation between respondents and third parties may have obviated the necessity of ordering production of any documents from the Commission's files.

One of the purposes of the Section 3.36 requirement that a respondent first attempt to obtain documents from third parties is to provide third parties an opportunity to negotiate with respondents. If the Section 3.36 requirement is now to be disregarded and third parties are not going to be provided the opportunity to negotiate with respect to the turning over of their confidential records no matter how sensitive those records may be, then voluntary compliance with the Commission's industry investigations will become a thing of the past.

The impact upon the resources and effectiveness of the Federal Trade Commission should voluntary compliance with Commission investigations cease would be considerable. It is for this very reason that this Commission has made it crystal clear that the investigatory files of the Commission will not be released in an adjudicative proceeding without a compelling showing of need.

> "Sensitive information of this nature should not be released by the Commission from its confidential files without compelling need. Disclosing information from the Commission's confidential files under a lesser standard would necessarily engender resistance on the part of companies and individuals cooperating in Commission industry investigations. It would be likely to seriously retard voluntary compliance with the Commission's efforts to obtain the data which it needs in industry inquiries. Obviously, the cooperation which

the Commission has received in the past from business depends in large part on the confidence of industry that confidential data submitted to this Agency will not be released in an adjudicative proceeding unless specific and concrete need therefor has been shown." The Seeburg Corporation, Docket No. 8682, Interlocutory Opinion, October 25, 1966 (70 F.T.C. 1809, 1813).

A brief review of the documents Judge Barnes has ordered complaint counsel to produce indicates clearly that BOC respondents have no need whatsoever to obtain the information in the extremely sensitive form in which it is set forth in those documents. It is outrageous that third parties were not given an opportunity as contemplated by Section 3.36 to provide BOC respondents with this information in a less sensitive form.

Judge Barnes has ordered complaint counsel to produce documents pursuant to Items 1, 2, 3, 4, 9, 13, 14, 16, 17, and 24 of BOC respondents' Specification 1; Items 10, 11 and 16 of their Specification 2; and Items (a) and (b) of their Specification 4. Pursuant to Item 1 of BOC respondents' Specification 1, complaint counsel are required to produce documents showing the capacities of specific plants of industrial gas producers. BOC respondents maintain that this information is relevant to the issues of market shares and whether there existed unutilized capacity which would affect entry into the United States market. */ Complaint counsel do not dispute the relevancy of plant capacity information.

However, BOC respondents do not need to know the capacities of the specific plants of the companies that submitted this information to the Commission. For their purposes it would be more than sufficient for BOC respondents to know the overall U.S. capacity of each company for various types of plants. That information would not be as sensitive as documents showing specific plant capacities. Specific plant capacity information is considered by the industry to be extremely critical as it indicates a company's competitive limitations in the geographic are as

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*/ Pretrial Hearing of March 28, 1974 (Topkis, Tr. at 49).

served by its plants. BOC respondents clearly should have requested plant capacity information from third parties and thereby given the third parties an opportunity to provide less sensitive information.

Pursuant to Items 2 and 3 of BOC respondents' Specification 1, complaint counsel must produce the documents indicating the production and net sales of specific gases. Complaint counsel has stated on the record that no attempt will be made to prove that specific gases constitute relevant submarkets in this case. Accordingly, BOC respondents certainly do not need to obtain documents showing production and net sales of specific types of gases.

The documents required to be produced pursuant to Item 4 of Specification 1 are those showing net sales of specific gases to direct industrial accounts. For the reasons stated above, BOC respondents do not need to obtain this information with respect to each type of gas.

Item 9 calls for production of general price schedules with accompanying trade announcements. This information is publicly disseminated by the companies and it is highly unlikely that any company would have refused to provide BOC respondents with this information if they had requested it from the companies.

Under Items 13 and 14 of Specification 1, complaint counsel are required to produce copies of exchange agreements and documents showing the amounts and value of each type of gas exchanged pursuant to the agreements. While the existence of exchange agreements may be relevant to this case, it is quite obvious that BOC respondents do not need to know the sensitive details of specific agreements.

Item 16 of Specification 1 requires production of statements indicating industrial gas accounts obtained while the accounts were previously under contract with another producer. The item also calls for production of all contracts relating to those accounts. BOC respondents argue that this information is relevant because it would indicate whether customers change suppliers and therefore would relate to ease of entry into the market. */ Surely BOC respondents do not need to know the names of specific

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*/ Pretrial Hearing of March 28, 1974 (Topkis, Tr. at 54-55).

customers or obtain copies of specific contracts to determine whether customers change suppliers.

Pursuant to Item 17 of Specification 1, complaint counsel must produce statements that indicate the types of industrial gas production facilities manufactured by companies and the companies' annual sales of each type of facility. Although the capacity of industrial gas companies to build gas plants may be relevant to this proceeding, the annual sales of companies for each type of facility could not possibly be needed by BOC respondents for this case. Information as to the type of facilities manufactured by companies is widely known and could have been readily obtained by BOC respondents from the companies.

Under Item 24 of Specification 1, complaint counsel are required to turn over statements indicating the rates of return of companies for each type of gas those companies produce. Rate of return information of the type reported in annual reports or otherwise generally known is relevant to this proceeding. However, the rate of return information specified in Item 24 is kept secret by each of the companies that submitted the information. Undisclosed or unknown rate of return information cannot conceivably be probative of either a company's intent or incentive to enter a market. The Item 24 information is simply not relevant to this proceeding and BOC respondents therefore have no need to obtain such extremely confidential information.

Pursuant to Items 10 and 11 of Specification 2 of BOC respondents' subpoena, complaint counsel must turn over all memoranda, studies, policy guidelines, directives, minutes, and internal correspondence relating to industrial gas pipelines and to the tendering of bids to customers purchasing industrial gas by pipeline. These items quite obviously lack the specificity that Section 3.36 requires. Moreover, the names of specific customers purchasing industrial gas by pipeline as solicited by this item are not needed by BOC respondents.

Item 16 of Specification 2 similarly lacks specificity as it calls for all memoranda, studies, policy guidelines, directives, minutes, and internal correspondence relating to acquisitions and joint ventures. Although occurences of acquisitions and existence of joint ventures are relevant to this proceeding, BOC respondents have no need to obtain the detailed proprietary information with respect to specific acquisitions and joint ventures specified by this item.

Finally, Judge Barnes has ordered complaint counsel pursuant to Items (a) and (b) of BOC respondents' Specification 4 to produce all documents relating to entry into the complaint markets and to change in market shares of producers engaged in the complaint markets. The difficulty with this specification is that it would require complaint counsel to turn over future marketing strategies of companies. The sensitivity of such strategies cannot be overemphasized. The companies that submitted these plans should have been given the opportunity to provide the information that BOC respondents need without revealing the specifics of their future plans.

It also should be made clear that BOC respondents do not need any of the documents they have requested from the Commission to obtain disclosure of complaint counsel's case. By March 28, 1974, fifteen days after the first pretrial conference in this proceeding, complaint counsel had fully disclosed its case to all respondents. Moreover, it is extremely unlikely that any of the documents Judge Barnes has ordered turned over to BOC respondents will actually be of any use to BOC respondents in their defense in this proceeding. While the Commission's investigatory files contain some documents relating to each item Judge Barnes has ordered produced, the information contained in those documents is largely fragmented and incomplete. The Commission staff has not completed its industrial gas investigation and many companies have yet to furnish all the information requested by the staff. As indicated in both of complaint counsel's written oppositions to BOC respondents' motion for a subpoena, complaint counsel have no intention of using for any purpose with respect to this case any of the documents submitted by companies pursuant to voluntary requests employed by the Commission staff during the industrial gas investigation.

Although complaint counsel are committed to expediting these proceedings and have made every conceivable effort to do so, complaint counsel do not believe that expediting this proceeding necessitates abandoning the Commission's Rules of Practice. BOC respondents had sufficient time to attempt to obtain the requested documents from third parties. Requiring BOC respondents to do so would clearly not have delayed this proceeding.

It should also be pointed out that the burden of expediting this proceeding has thus far been largely borne by complaint counsel. On March 13, 1974, Judge Barnes issued a subpoena requiring production of certain documents by respondent BOC

by March 28, 1974. Despite BOC respondents' proclaimed concern for expediting these proceedings, respondent BOC did not complete its return under that subpoena until four weeks after the subpoena's return date. Moreover, it was only after complaint counsel filed a motion requesting that respondent BOC be required forthwith to comply with that subpoena that respondent BOC finally completed its return.

Were BOC respondents genuinely concerned with expediting these proceedings they would long ago have made a sincere effort to obtain the requested documents from third parties as required by Section 3.36. Now, one week before trial is scheduled to commence, BOC respondents are asking the Commission to disregard its Rules and overlook the fact that BOC respondent had two months within which to comply with those Rules but failed to do so.

A revealing indication of BOC respondents' acutal need to obtain the requested documents from the Commission is a statement by their counsel at the pretrial hearing on March 28, 1974, that BOC respondents will be prepared and ready for trial without these documents. */ This remark prompted Judge Barnes to state that perhaps BOC respondents did not need the documents. **/

For the foregoing reasons, complaint counsel request that Judge Barnes' order of April 23, 1974, requiring production of documents from the investigatory files of the Federal Trade Commission be set aside.

Respectfully submitted,

K Keith Thurman,
Gordon Youngwood,
Donald E. Purcell,
Daryl A. Nickel,
Rhett R. Krulla,
John R. Hoagland,
Counsel Supporting
the Complaint.

By Daryl A. Nickel

Dated: April 29, 1974

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*/ Pretrial Hearing of March 28, 1974 (Topkis, Tr. at 77).

**/ Id. (Judge Barnes, Tr. at 77).

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

BRITISH OXYGEN COMPANY, LTD.,
BOC INTERNATIONAL LIMITED,
BOC HOLDINGS LTD. INCORPORATED,
LINDE AKTIENGESELLSCHAFT, LINDE, INC.,
AIRCO, INCORPORATED,

Docket No. 8925

APPLICATION OF LIQUID AIR INC.
FOR LEAVE TO FILE [illegible]
MOTION TO [illegible]
A SUBPOENA DUCES TECUM

COUDERT BROTHERS
Attorneys for Liquid Air Inc.
200 Park Avenue
New York, New York 10017
(212) 973-8300

E. A. Dominianni
James M. Rhodes

Of Counsel

BEST COPY AVAILABLE

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	:	
BRITISH OXYGEN COMPANY, LTD., BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED.	:	Docket No. 8955

TO: The Federal Trade Commission
Washington, D.C.

APPLICATION OF LIQUID AIR INC. FOR REVIEW OF ORDER RULING ON MOTION OF BOC RESPONDENTS FOR A SUBPOENA DUCES TECUM

Liquid Air Inc. ("Liquid Air"), not a party in this proceeding, through its counsel, appears specially and hereby files its application for review by the Federal Trade Commission ("the Commission") of the Order of the Honorable Ernest G. Barnes, Administrative Law Judge, ruling on the motion of the BOC respondents for a subpoena duces tecum ("the Order"), which Order was dated and filed April 23, 1974.

This application is submitted pursuant to Section 3.23(a)(1) of the Procedures and Rules of Practice of the Commission. Although Liquid Air is not a party to this proceeding,

it is respectfully submitted that no motion for intervention is here necessary in light of the special circumstances of this proceeding as hereinafter set forth.

In this proceeding wherein Complaint Counsel seek to enjoin a specific acquisition by the BOC respondents, said respondents moved for issuance of a subpoena duces tecum which would involve the production by the Commission of documents obtained pursuant to request from third parties, including Liquid Air, subject to confidential handling. Accordingly, at the direction of the Administrative Law Judge, the third parties were notified and invited to file briefs and to make appearances before the Judge at a pre-hearing conference to be held on April 17, 1974. Liquid Air responded by letters dated March 21 and April 2, 1974, by its attorneys, opposing such motion to the extent it would require disclosure and production of the Liquid Air material. In addition, its attorneys filed a memorandum in opposition to the motion with the Commission on April 12, 1974 and appeared at the pre-hearing conference and made a further, oral presentation in opposition to such production.

The Administrative Law Judge, in ruling upon the motion, made an Order compelling the production of a substantial amount of the material sought by the BOC respondents in their subpoena. In such Order, the Judge clearly contemplated and even invited application for review of the Order to the Commission by third parties:

"As requested by third parties at the pre-hearing conference held on April 17, 1974, complaint counsel are ordered to wait five (5) days from the date of service of this order before turning any documents over to FOC. This time interval is granted so that third parties may seek Commission review of this ruling, if they so desire." (Order at 15, 16)

By this application, Liquid Air thus requests that the Commission entertain review of the subject Order.

Liquid Air supplied information voluntarily in response to the request of the Commission staff in connection with an investigation of the industrial gas industry under File No. 741 0005, undertaking to cooperate with such request upon the express understanding that all such information produced would be treated in confidence. Although the Order would not require production of all of the documents originally sought by subpoena and sets forth and incorporates a protective order which would govern disclosure of the material whose production is mandated, it is nonetheless founded upon an inadequate showing of need and relevance and would result in severe competitive harm, notwithstanding any protective order, no matter how thoroughly drafted. In this light, the Order must be reviewed.

Competitive Harm to Liquid Air

Disclosure of the information under the Order would quite clearly result in serious damage to Liquid Air, which is

particularly anomalous in light of the incomplete and fragmented nature of much of the material sought. For example, paragraphs 1-4 of Specification 1 would obtain capacity, production and sales information. Since such information, particularly plant capacity and production data, determines marketing policy to some extent, its disclosure to competitors such as respondents would thereby damage Liquid Air. On the other hand, Complaint Counsel has advised that such information is incomplete and fragmented since it has been obtained from only four companies and would therefore not be useful in establishing market shares of those particular companies nor in establishing a market universe. Furthermore, complete information on an industry basis is available from the Department of Commerce. (Complaint Counsel's Supplemental Memorandum at 9)

Second, paragraphs 13 and 14 would obtain information respecting exchange agreements. Such agreements are of critical importance to small companies such as Liquid Air, permitting market penetration beyond that permitted by established plant location. For this reason, the agreements themselves reflect sensitive negotiations with other parties and disclosure of information concerning them, not to mention the agreements themselves, could disastrously affect the ability of Liquid Air to compete successfully with much larger companies, such as respondents.

Third, paragraph 24 would obtain unconsolidated rates of return information for each type of gas involved. Such data is, of course, among the most sensitive financial information possessed by Liquid Air. Its disclosure may have any number of dire consequences. On the other hand, that information in the hands of the Commission appears to have only the most dubious relationship in this proceeding, since the Commission has such information from only four companies and that information certainly is not probative of the subjective intent of the respondents. (Supplemental Memorandum at 12)

Fourth, paragraphs 10 and 11 of Specification 2 call for production of material relating to industrial gas product pipelines and bids to customers purchasing gas products by pipelines. These are not product markets even relevant to this proceeding.

In short, the BOC requests seek the production of documents obtained by the Commission in a general industry-wide investigation subject to guarantees of confidentiality and which have little or no relevance to the issues in this proceeding. As such, the requests are too broad and unreasonable. The BOC respondents should not be permitted, by this Order, to obtain broad investigatory material whose disclosure can do great competitive harm. Disclosure of such information

would give the respondents herein an unfair competitive advantage vis-a-vis Liquid Air, since they could thereby determine its marketing policies, the strength of its financial position, the terms and magnitude of its exchange agreements, and other categories of sensitive business information.

There Has Been No Requisite Showing of Need or Relevance

Set against this bleak picture of likely competitive harm to third parties which would be occasioned by disclosure of documents conveyed to the Commission in the public interest, there can be found no requisite need or relevancy upon which the Order can be predicated. Such information should not be provided absent a showing of specific and concrete need, and the Commission rules clearly recognize this standard. Further, the Rules protect the public interest in the gathering of information. See Section 3.36 of the Rules of Practice. Such rules and interests have not been served here. Disclosure under the Order would not only work competitive harm to the third parties, but would also hobble the Commission's future efforts to obtain data for its industry-wide investigations.

Further, it is submitted that most of the Liquid Air information is not subject to disclosure under relevant statutory authority and the Rules of Practice of the Commission. See 15 U.S.C. §46(f); Sections 4.10(a)(2) and 4.10(a)(5) of the Rules of Practice of the Commission. At the least, the Liquid Air documents should be made subject to an in camera

order pursuant to Section 3.45 of the Commission Rules.

Therefore, Liquid Air respectfully submits that the Commission should entertain this application, staying the return date of the Order and placing the matter on its docket for review. Liquid Air further respectfully submits that the scope of review should include overruling the Order or, in the alternative, remanding this matter to the Administrative Law Judge for further consideration.

Respectfully submitted,

/s/ E. A. Dominianni

E. A. Dominianni

/s/ James M. Rhodes

James M. Rhodes

Counsel for Liquid Air Inc.

April 30, 1974

CERTIFICATE OF SERVICE

This is to certify that I have caused this day to be mailed, by ordinary mail, the annexed "Application of Liquid Air Inc. for Review of Order Ruling on Motion of FTC Respondents for a Subpoena Duces Tecum" to the following:

Donald E. Purcell, Esq.
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

Jay H. Topkis, Esq.
Paul, Weiss, Rifkind,
Wharton & Garrison
345 Park Avenue
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George J. Wade, Esq.
Shearman & Sterling
53 Wall Street
New York, New York 10005

/s/ James M. Rhodes
JAMES M. RHODES

Dated: New York, New York
April 30, 1974

A 218

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April 30, 1974

Donald E. Purcell, Esq.
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George J. Wade, Esq.
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53 Wall Street
New York, New York 10005

Re: British Oxygen Company, Ltd. et al.

Gentlemen:

Enclosed please find a copy of an Application for Review of Order Ruling on Motion of BOC Respondents for a Subpoena Duces Tecum, filed with the Federal Trade Commission today on behalf of Liquid Air Inc.

Sincerely yours,

James M. Rhodes

JMR:MD
Encl.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED.	)	DOCKET NO. 8955

To: Mr. Charles A. Tobin, Secretary
Federal Trade Commission

APPEAL FROM THE RULING OF
ADMINISTRATIVE LAW JUDGE ON
RESPONDENTS' MOTION FOR SUBPOENA

Pursuant to section 3.23 of the Commission's Rules of Practice, Air Products and Chemicals, Inc., hereby appeals from the April 23, 1974, order of Administrative Law Judge Ernest G. Barnes ruling on the Motion of BOC Respondents for a Subpoena Duces Tecum. Air Products has a direct interest in this matter because that order would compel Commission Staff to reveal to respondents a mass of highly confidential Company documents which the Company had voluntarily produced to the Commission pursuant to a confidentiality commitment.

The Company previously has aired these concerns in written and oral presentations to the Administrative Law Judge. Notwithstanding those, and other objections by complaint counsel and many other third parties, Law Judge Barnes

has ordered prompt production of many of the documents covered by the subpoena.*/ We are appealing that order because we believe it is contrary to law and violates the rights of Air Products in substantial respects.

I.

THE LAW JUDGE ERRED IN ORDERING PRODUCTION OF DOCUMENTS COVERED BY THE BOC SUBPOENA.

Air Products' basic position is that the motion should be quashed in its entirety and that the Law Judge erred in failing to do so. That is so for a number of reasons.

1. Virtually all of the Company's documents which would have to be produced under the subpoena are highly confidential business records. The records include pricing lists, elaborate cost data, detailed financial information, customer lists, confidential contracts, and an enormous volume of other corporate records, none of which is regularly made public. The records were turned over to the Federal Trade Commission, not because they were deemed nonconfidential, but in a spirit of cooperation with the Government and on the understanding that the documents would be retained by the Government and never revealed to outsiders. The authorities are clear that an innocent third party is entitled to

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*/ At the prehearing conference on April 25, complaint counsel advised Judge Barnes that complaint counsel would appeal the order to the Commission. Judge Barnes indicated that if that appeal was perfected by April 30, his production order would be stayed pending Commission action.

special protection against the wholesale invasion of confidential documents, a principle which applies with particular force when the third party voluntarily produces documents to the Government on the understanding that those documents would be afforded confidential treatment. See, e.g., FTC v. Bowman, 149 F. Supp. 624, 629-30 (N.D. Ill. 1957); Mississippi River Fuel Corp., FTC Dkt. No. 8657 (Interlocutory Order, October 8, 1965); United States v. Serta Associates, 29 F.R.D. 136, 138 (N.D. Ill. 1961); Less v. Tabor, 53 F.R.D. 645, 647 (W.D.N.Y. 1971). */

2. Movants have not satisfied their burden to demonstrate the "general relevancy of the material and the reasonableness of the scope of the subpoena." FTC R. Prac. 3.34(b), 3.36(b). As part of that showing, the subpoenaing party must demonstrate a clear and substantial "need" for the documents in order to present its case. Kellogg Co., et al., FTC Dkt. No. 8883 (Prehearing Conf. Order, May 3, 1973); Papercraft Corp. v. FTC, 472 F.2d 927, 929-30 (7th Cir. 1973). It is also settled that a "strong showing of relevance is necessary" before a third party will be required to reveal confidential documents. Zenith Radio Corp. v. RCA, 106 F. Supp. 561, 565 n.6 (D. Del. 1952); Independent

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*/ It is no answer to say that the Administrative Law Judge has made the production subject to a protective order. Much of the information sought is so critically confidential that Air Products guards it jealously even within its own organization, and thus should not be compelled to disclose it to any outsider, much less to, inter alia, members of a law firm one of whose partners is a director of a leading competitor of Air Products.

Productions Corp. v. Loew's, Inc., 7 Fed. Rules Serv. 2d 34.41, Case 1 (S.D.N.Y. 1963); Spier v. Home Insurance Co., 404 F.2d 896, 899 (7th Cir. 1968); Crown Cork & Seal Co. [1967-69 Transfer Binder], Trade Reg. Rep. ¶ 17,828, at 23,201 (F.T.C. 1967).

Respondents' motion does not even undertake, much less make, a showing that the items in the subpoena are relevant or necessary for the prosecution of the case. Instead, their argument consists entirely of a broadbrush claim that: (1) the documents are necessary and relevant because complaint counsel has access to them; (2) this somehow means that "complaint counsel has already determined" that the documents are "relevant"; and (3) this claim, in turn, somehow disposes of respondents' obligation to demonstrate reasonableness, relevance and need. (Motion, p. 3.*/) Suffice it to say that this string of non sequiturs does not even approach the showing of clear relevance and demonstrable need that must be made if access to confidential third party documents is to be had.

3. Even if respondents could make a showing of relevance and need for third party documents, they are not entitled to gain access to third party documents in the possession of the Commission. The Commission's regulations expressly provide that documents such as those subject to the subpoena are "confidential information."**/ Moreover, the

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*/ The documents in the possession of complaint counsel were not collected for purposes of prosecuting this case but as part of an entirely different investigation.

**/ Section 4.10(a)(2) provides that "confidential information" includes "trade secrets and the names of customers and commercial or financial information obtained from any person which is customarily privileged or which is expressly received by the Commission in confidence, ..."

regulations contemplate, in section 3.34, that third party documents will be sought by subpoenas served upon the third parties. In fact, section 3.36 expressly prohibits the subpoenaing of Commission files absent "a showing that such material, information, or testimony is not available from other sources by voluntary methods or pursuant to §§ 3.33-3.34." Respondents have not, and cannot, make that showing because they have not sought these records directly from third parties. */ Thus, to the extent respondents desired access to third party documents they should have followed the Commission's rules and sought those documents by narrow and specific subpoenas served upon individual third parties. If respondents had followed that course, they could have narrowed their request for information to specific categories and documents which are known to be, or thought to be, in the files of individual third parties. That procedure would also have permitted individual negotiations between respondents and third parties which could well have obviated the necessity for any discovery disputes or at least substantially narrowed the issues as to the items in dispute.

In his order Judge Barnes recognizes that the subpoena is contrary to the Commission's rules. He concludes,

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*/ Of course, the Commission's regulations are mandatory. Parties, such as Air Products, affected by the regulations must be afforded all of the protections provided for in the regulations. Service v. Dulles, 354 U.S. 363 (1957); Vitarelli v. Seaton, 359 U.S. 535 (1959); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954).

however, that adherence to "the requirement that respondents first exhaust third-party sources before seeking documents in the Commission's possession would unnecessarily delay the trial of this matter." (Order, p. 8.) In support of that conclusion, he emphasizes that the Commission is under court order to expedite the proceeding. There are two major flaws in that position. First, we are aware of no authority, and the Law Judge has cited none, for the proposition that the Commission's rules can be ignored in the interest of expedition. Such a conclusion is completely contrary to a long line of Supreme Court cases, some of which are cited above, which hold that an agency is bound to adhere to its own regulations and that the parties affected by those regulations are entitled to rely upon them. Second, there is no reason why the case would have been delayed if respondents had applied for issuance of subpoenas upon third parties rather than upon the Commission. Nine weeks have now passed since the complaint was issued. Respondents could have sought subpoenas under section 3.34 long ago. Even if there had been a dispute on the subpoenas, any motions to limit or quash (which must be filed within ten days) could have been disposed of weeks ago.

II.

IF THE SUBPOENA IS NOT QUASHED, IT SHOULD BE LIMITED IN THREE IMPORTANT RESPECTS

In the event that the subpoena is not quashed, we believe that it should be limited by excluding from the subpoena several categories of extremely sensitive documentation, the disclosure of which could irreparably injure Air Products and the other parties whose documents are the subject of respondents' motion. Further, we do not believe that the elimination of any of these items will prejudice the rights of respondents in any respect because none of this data has any relevance to this case.

1. Item 24 - Rates of Return

Item 24 of the BOC subpoena covers third party documents in the Commission's files setting forth the following:

> "A statement indicating unconsolidated rates of return for each type of gas for each of the years, calendar or fiscal, 1967 to date. This statement should reflect rates of return based on net annual sales, stockholder's equity and assets related to the production and sale of industrial gas."

This item should be stricken from the subpoena for two reasons. First, we cannot conceive of any possible relevance for this information. BOC's motion makes no effort to explain it. Counsel for the BOC respondents stated at the prehearing conference that BOC viewed the industrial gas industry in the

United States as a "disaster area" and that the information submitted pursuant to Item 24 would indicate whether or not his client's view was correct. The answer to that is that, while BOC's subjective perception of the United States industry may be relevant, the actual (secret) profitability of the industry would have no bearing on their actions and is beside the point. Further, complaint counsel stipulated at the prehearing conference that for purposes of the complaint, the relevant product market with respect to industrial gases was the entire industrial gas market and that complaint counsel would not attempt to establish industrial gas submarkets. */ Accordingly, there surely is no reason for BOC respondents to obtain information broken down by individual industrial gases. **/

Second, this information is exceedingly confidential. The Company's controller, Daniel McGinnis, explained at the prehearing conference on April 17 that this information was never revealed to outsiders, was known only to a handful of Company officials, and that no Company information was more closely guarded.

In view of these considerations, Item 24 should be stricken or, alternatively, the figure should be supplied to

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*/ Complaint Counsel's Supplemental Memorandum in Opposition to BOC Respondents' Motion for a Subpoena Duces Tecum, April 1, 1974, p. 10.

**/ The Law Judge's order simply states, without discussion, that "rates of return in the industrial gas industry appear relevant" (p. 11). No attempt was made to explain why that was so or why information on individual gases was necessary.

respondents on an industry-wide basis so that the figures for individual companies will not be revealed. See Mississippi River Fuel Corp., 669 F.T.C. 1186, 1189 (1966).*/

2. Item 16 - Gas Account Contracts

Item 16 would require the Commission to disgorge the following documents submitted by Air Products:

> "A statement indicating those industrial gas accounts obtained, while under contract with another producer of industrial gas, by your company during the period 1967 to date. Submit a copy of all contracts between your company and those accounts obtained."

This information is irrelevant. Judge Barnes' order states that these documents "may well have some relevance" in light of BOC's argument that "if there are long-term supply contracts, and if the customers do not change suppliers, this would bear on ease of entry into the industrial gas market." (Order, p. 10.) That justification might support production of information as to whether individual third companies had ever obtained industrial gas accounts while those accounts were under contract with another producer and, perhaps, the

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*/ In an effort to avoid further litigation on this point, several third parties, including Air Products, have offered to supply to respondents a summary of the information called for by Item 24, i.e., as to both the Company's "process gas" and "atmospheric gas" operations, the Company would produce total figures for each category setting forth net sales, gross margin, total overhead, depreciation, interest and other income, pre- and post-tax income, and total rates of return. Counsel for BOC indicated that he was receptive to that proposal but has not decided whether to accept it. It is possible that we will be able to withdraw our specific objection to this item if BOC counsel will accept that information in that form.

number of times that had happened in a prescribed period. But the subpoena specification goes far beyond that and would require revelation not only of Air Products' individual customers but copies of all of the contracts with those customers. Those contracts, of course, reveal customer names, prices, terms, and substantial amounts of other information totally irrelevant to any point BOC is trying to establish.

Moreover, as Mr. McGinnis explained at the prehearing conference, this information is extremely sensitive. The Commission's rules themselves recognize the confidentiality of "names of customers" (section 4.10). The production of the entire contracts with those customers would reveal that information and much more. Item 16 should be stricken. */

3. Items 2-5 - Individual Gas Production and Sales Data

Items 2 through 5 seek a variety of information respecting production and sales data broken down by individual industrial gases. Judge Barnes' order is unclear on whether this information must be produced on a gas-by-gas basis or whether summaries can be produced showing total production and sales of all industrial gases. Air Products will voluntarily produce a schedule showing sales and

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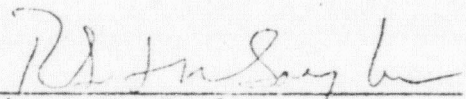
*/ Air Products voluntarily will supply a statement indicating the number of gas accounts, as described in item 16, obtained for the period 1967 to date and the average or normal range of such contracts.

production figures for all process gases on the one hand and all atmospheric gases on the other. We believe, however, that the subpoena specifications should be stricken in their present form. The information is confidential in the extreme and the data for individual gases, as indicated above, has nothing to do with the case.

CONCLUSION

For the foregoing reasons, Air Products respectfully submits that the BOC subpoena of March 19, 1974, be quashed, or alternatively that it be limited in the respects set forth above.

Respectfully submitted,



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April 30, 1974

CERTIFICATE OF SERVICE

This is to certify that the foregoing APPEAL FROM THE RULING OF ADMINISTRATIVE LAW JUDGE ON RESPONDENTS' MOTION FOR SUBPOENA has been hand-delivered to the Office of the Secretary, Federal Trade Commission, Washington, D.C. (25 copies); mailed to Paul, Weiss, Rifkind, Wharton & Garrison, attorneys for BOC Respondents (2 copies); and mailed to the Third Parties.

Robert N. Sayler

April 30, 1974

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED	DOCKET NO. 8955

APPLICATION FOR REVIEW AND APPEAL BY UNION CARBIDE CORPORATION OF RULING BY ADMINISTRATIVE LAW JUDGE REQUIRING PRODUCTION OF CONFIDENTIAL UNION CARBIDE DOCUMENTS

Union Carbide Corporation, not a party to this proceeding, appearing specially through its counsel, pursuant to Section 3.23 of the Commission's Rules of Practice, files this application for review and appeal of an order of the Administrative Law Judge issued April 23, 1974, requiring production by complaint counsel of confidential documents voluntarily produced by Union Carbide in the Commission's separate investigation of trade practices in the industrial gas industry (File No. 741 0005).

On this appeal, Union Carbide asks that the Commission vacate the order of April 23, 1974, and remand the matter to the Administrative Law Judge with instructions that he determine whether the BOC respondents herein have made the showing required under Section 3.36 of the Commission's Rules of Practice (1) that the Union Carbide material they seek is generally relevant to the issues in this proceeding, (2) that the scope of their demand is reasonable, and (3) that the material is not available from Union Carbide through voluntary efforts.

Alternatively, Union Carbide asks, in the event the Commission upholds the Administrative Law Judge's ruling, that the conditions set forth in his accompanying Protective Order be modified.

Finally, Union Carbide asks, in the event the Commission does not vacate the Administrative Law Judge's ruling, that the Commission stay complaint counsel's production of these materials for ten days after entry of the Commission's order to permit Union Carbide to seek such other relief as it may deem necessary and proper in the circumstances.

STATEMENT OF FACTS

On August 20, 1973, the Commission's Bureau of Competition commenced an investigation into trade practices in the industrial gas industry (FTC File No. 741 0005) by sending to Union Carbide and other industry members a lengthy letter questionnaire requesting copies of a wide range of Union Carbide documents in 34 separate subject categories and access to a massive volume of additional materials in 18 other categories. Nothing in the questionnaire bore upon BOC's subsequent acquisition of AIRCO stock. Because the August 20, 1973, letter sought highly sensitive, confidential Union Carbide materials, Union Carbide, on October 16, 1973, made formal application to the Commission for assurances of confidential treatment of such materials.

On January 9, 1974, the Commission granted Union Carbide's confidentiality application: Union Carbide would be given ten days' notice of the Commission's intention to disclose confidential Union Carbide materials; if Union Carbide should object to such disclosure, and the Commission thereafter determine that disclosure would nonetheless be made, Union Carbide

would have an additional ten days before disclosure commenced. The letter noted that the Commission's assurances were given "with the understanding that in the event of issuance of an adjudicative complaint in this matter, the confidential status of the specified information and the limitations on its disclosure shall be governed solely by the applicable provisions of the Commission's Rules of Practice, Part 3 -- Rules of Practice for Adjudicative Proceedings" (emphasis added).

On February 26, 1974, the Commission issued its complaint challenging BOC's acquisition of AIRCO stock under Section 7 of the Clayton Act. Thereafter, counsel for BOC requested that complaint counsel voluntarily provide BOC with copies of the confidential materials which Union Carbide had submitted in the separate industrial gas industry investigation under the Commission's assurances of confidentiality. When complaint counsel declined to provide these materials, BOC filed its motion for issuance of a subpoena duces tecum.

On March 15, 1974, noting BOC's efforts to obtain access to the confidential Union Carbide materials, Union Carbide requested that the Commission affirm the assurances of confidentiality contained in its January 9 letter.

On April 23, 1974, the Administrative Law Judge issued his ruling on BOC's motion for subpoena duces tecum. On the same day, the Commission's secretary responded to Union Carbide's letter of March 15, 1974, asserting that "this complaint grew out of the industrial gas industry investigation and consequently triggers the . . . condition contained in the last paragraph of the Commission's January 9 letter." Thus, "the confidential

status of Union Carbide's information . . . shall be governed solely by the Commission's Rules of Practice . . . for Adjudicative Proceedings" (emphasis in original).[1/] The Secretary's letter did not state that it had been issued by direction of the Commission.

INTRODUCTORY STATEMENT

Disclosure to BOC of the confidential Union Carbide materials submitted in the industrial gas industry investigation could cause Union Carbide irreparable injury. BOC has utterly failed to show a compelling need for such materials and it has not even attempted to seek to obtain the information through voluntary means. Union Carbide has advised BOC of its willingness to provide summaries or composites of all relevant information in such form as will allow BOC fully to respond to the allegations of the complaint; and Union Carbide stands prepared now to meet promptly with BOC representatives to accomplish such voluntary production.

The Administrative Law Judge's order requires production of a wide

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1/ While it appears that the investigation of BOC's acquisition of AIRCO stock, which apparently commenced in or about December 1973, bore the same file number as did the plenary investigation of trade practices in the industrial gas industry which commenced with issuance of the Commission's letter-questionnaire in August 1973, there was no inquiry relative to BOC-AIRCO in the August letter, nor did Union Carbide have reason to contemplate that a BOC-AIRCO investigation was imminent at the time it filed its request for confidentiality in October 1973. It thus strains interpretation of the Commission's letter of January 9, 1974, to suggest that the limitation with respect to issuance of an adjudicative complaint "in this matter" was intended to reach a Section 7 complaint against two of Union Carbide's principal competitors, arising out of an investigation which was not a part of the original investigation that gave rise to Union Carbide's concern over confidentiality and which had not even commenced at the time Union Carbide petitioned the Commission for assurances of confidentiality.

range of confidential material, e.g., information concerning individual gas plant production and capacity (Specification 1, Item 1), production and sales of each category of industrial gas (Specification 1, Items 2-5), the details of gas exchange agreements (Specification 1, Items 13-14) and rate of return for each category of industrial gas (Specification 1, Item 24).

This information has never been revealed to Union Carbide's competitors and Union Carbide considers that the disclosure now to BOC, even under the most stringent protective conditions, would constitute a grave competitive hazard. In Union Carbide's view, the specific materials sought by BOC are extraordinarily sensitive and Union Carbide's willingness voluntarily to commence production of this information to the FTC staff in its industrial gas investigation was based fundamentally upon the assurances of confidentiality given Union Carbide by the Commission in its letter of January 9, 1974.

These materials include highly confidential Union Carbide's trade secrets, including the success of the company's previous business planning decisions, areas of possible future expansion of the company's facilities and marketing activities, and markets and product lines where the company could be vulnerable to loss of business to its competitors.

Union Carbide, as a third party in this adjudicative proceeding,[2/] is entitled to meticulous observance of the requirements of Section 3.36 of

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2/ See, e.g., FTC v. Bowman, 149 F. Supp. 624, 629-630 (N.D. Ill. 1957); Mississippi River Fuel Corp., FTC Dkt. No. 8657 (Interlocutory Order, Oct. 5, 1965). Unless such protection is afforded, firms subject to future FTC staff investigations may resist producing highly confidential data which they know may subsequently be disclosed to competitors.

the Commission's Rules of Practice and BOC should not be permitted to subpoena these materials without demonstrating that its need is immediate and compelling and that it has exhausted all reasonable efforts to obtain the information through voluntary means.

BOC HAS FAILED TO MAKE THE REQUIRED SHOWING AS TO THE REASONABLENESS OF THE SCOPE OF ITS APPLICATION FOR A SUBPOENA DUCES TECUM

Section 3.36(b) of the Commission's Rules requires that an application for a subpoena of Commission records shall be made in the form of a written motion which shall contain a statement as to "the reasonableness of the scope of the application." Union Carbide submits that BOC has failed to make this showing.

BOC's subpoena seeks production of highly confidential documents which, inter alia, describe in minute detail sales and cost figures relating to each gas produced by Union Carbide and Union Carbide's production capacity on a plant-by-plant basis. The information provided in such documents is far more detailed than legitimately necessary for BOC's defense in this case, especially since the complaint is directed at relatively broad product groupings distributed to the entire U.S. industrial gas market.

The Commission has held that "sensitive information of this nature should not be released by the Commission from its confidential files without compelling need." The Seeburg Corporation, Docket No. 8682, Commission Opinion, October 25, 1966 (70 FTC 1809). BOC's application fails to demonstrate any such "compelling need" for access to the confidential Union Carbide data. Moreover, since Union Carbide has now offered voluntarily to produce composite data which will permit BOC fully to

respond to allegations of the complaint, there is no basis upon which BOC can assert that its need to prepare an adequate defense should override the public interest in preserving the confidentiality of Union Carbide's documents or in protecting this information from unnecessary disclosure to Union Carbide's competitors. BOC has not met its burden of establishing the "reasonableness of the scope" of its application.

BOC HAS FAILED TO SHOW THE RELEVANCE OF THE RATE OF RETURN DATA SOUGHT IN ITS SUBPOENA DUCES TECUM

Section 3.36 of the Commission's Rules requires that an application for a subpoena of Commission records shall be made in the form of a written motion which shall contain a statement as to "the general relevancy" of the information sought. As to rate of return data, BOC has failed to make this showing.

In its subpoena (Specification 1, Item 24), BOC seeks the production of rate of return data previously submitted by Union Carbide in confidence to the FTC staff in FTC File No. 741 0005. BOC asserts that it needs access to that highly confidential data in this case in order to support its argument that rates of return in the industry are so low that it would not enter the United States market on a de novo basis.

While it may be that such rates of return would have been sufficiently low to discourage BOC's entry, it is difficult to see how BOC would have been discouraged from de novo entry into the United States market unless it knew the details of Union Carbide's rates of return. Union Carbide's rates of return, however, have never been made public. Therefore, rate of return data, since it was then unknown, is wholly irrelevant to BOC's

state of mind at the time of Airco acquisition as to whether BOC would have, but for the acquisition, entered the United States market de novo, or perhaps by toe-hold acquisition.

BOC'S FAILURE TO SEEK VOLUNTARY PRODUCTION OF INFORMATION FROM UNION CARBIDE PRECLUDES ISSUANCE OF THE SUBPOENA DUCES TECUM

Commission Rule 3.36(b) requires that an application for subpoena duces tecum include "a showing that such material, information, or testimony is not available from other sources by voluntary methods . . . ." BOC has not only failed to make such a showing, it has in fact failed to make any request whatsoever of Union Carbide for market or other information which may be helpful to BOC's defense.

BOC has asserted that it need not expend the effort to request information of third parties because it is clear that such a request would be summarily denied. Moreover, BOC argues that the District Court's order of March 8, 1974, to the Commission that it expedite this proceeding does not permit sufficient time for BOC successfully to make such requests of third parties, while, on the other hand, the Commission staff has the necessary information in hand and can make it immediately available. The Administrative Law Judge, in his order, also asserted that confidentiality is no ground for denying production because, in the final analysis, BOC would be entitled to the documents via direct subpoena to third parties such as Union Carbide. These assertions, however, merely obscure the plain facts that (1) BOC has not complied with the Commission rules and (2) any delay can be attributed to BOC's failure to seek to obtain relevant information voluntarily from Union Carbide.

The Commission's rule requiring that document requests be first made to third parties rather than the Commission staff is designed to avoid wasteful expenditures of the staff's time on document production, and to preserve so far as possible the confidentiality of the Commission's own files. To be sure, respondents are entitled to the information necessary for their defense; and recognize that these proceedings are to be expedited so as to comply with the District Court's order and to minimize any damage BOC might suffer by delay. But these objectives, we submit, may be accomplished while still according necessary protection to third-party rights.

Finally, it is noteworthy that as long ago as April 3, 1974, at a meeting with counsel for BOC held to discuss the possible testimony of a Union Carbide executive, Union Carbide offered to make available to BOC in composite form information necessary to BOC's defense. This offer has been repeated since that time and was, in fact, made on the record at the April 17, 1974, preliminary hearing. BOC, however, paid no heed to Union Carbide's offers, preferring, apparently, the more difficult route of formal subpoena litigation.

Union Carbide continues its offer and willingness to discuss in good faith any reasonable request by BOC for market or other information in the form necessary for adequate preparation of BOC's case.

UNION CARBIDE'S OBJECTIONS TO THE FORM OF THE PROTECTIVE ORDER

Union Carbide also submits that the Administrative Law Judge's protective order fails adequately to protect against disclosure of confidential information to Union Carbide's competitors.

Paragraph (1) of the protective order provides that confidential Union Carbide documents may be disclosed to "independent outside counsel" upon BOC's filing "an official document of record" identifying such counsel. Paragraph (3) of the order provides for disclosure to "independent designated experts" under the same procedure. Paragraph (4) provides that counsel may apply to the Administrative Law Judge for authorization to make disclosure to "other specified persons" upon a proper showing of necessity. The protective order should be amended to require prior notification to Union Carbide of all persons who, under the authority of Paragraphs (1), (3) and (4), will have access to Union Carbide documents so that Union Carbide will have an opportunity to make timely objection to disclosure to persons believed by Union Carbide not to merit the Administrative Law Judge's confidence.

REQUEST FOR STAY

In the event that the Commission nevertheless affirms (or modifies and affirms) the Administrative Law Judge's order, Union Carbide requests a ten-day stay of the Commission's ruling.

In its letter of January 9, 1974, the Commission assured Union Carbide that it would not require disclosure of confidential Union Carbide materials until ten days after Union Carbide was notified of the Commission's determination. The Secretary's letter to Union Carbide's counsel of April 23, 1974, stated that this condition was no longer operative and that "the confidential status of Union Carbide's information and the limitations on its disclosure shall be governed solely by the applicable provisions of the Commission's Rules of Practice [for Adjudicative Proceedings]."

As noted (fn. 1, p. 4, supra), Union Carbide disputes this construction of the Commission's January 9 letter. However, granting the ten-day stay requested herein will conform the Commission's ruling to its earlier assurances and thus avoid a further contest over the scope of the January 9 letter.

Oral argument on this appeal is requested.

Respectfully submitted,

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April 30, 1974

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED.	DOCKET NO. 8955

TO: THE FEDERAL TRADE COMMISSION

INTERLOCUTORY APPEAL OF BIG THREE INDUSTRIES, INC.
FROM RULING OF ADMINISTRATIVE LAW JUDGE

Big Three Industries, Inc. ("Big Three"), not a party to this proceeding, through its counsel appears specially and files this its Interlocutory Appeal from the Administrative Law Judge's Order Ruling on a Motion of BOC Respondents for a Subpoena Duces Tecum ("the Order"). In support of this Appeal, counsel for Big Three would respectfully show the following:

I.

The Order was entered under date of April 23, 1974. Big Three has not been served with the Order, but obtained a copy on April 29, 1974. This Interlocutory Appeal is prosecuted pursuant to Section 3.23(a) and (c) of the Procedures

and Rules of Practice of the Commission.

II.

On or about November 2, 1973, at the specific request of the Commission staff, Big Three voluntarily produced numerous documents in connection with the Commission's investigation of trade practices in the industrial gas industry, File No. 741 0005. In telephone conferences with Commission staff attorneys and by its letter dated November 2, 1973, Big Three expressly advised the Commission and the staff that the information furnished was privileged and confidential, contained Big Three's trade secrets and names of its customers, and also contained the company's commercial and financial information. Accordingly, all such responses and materials were tendered to the Commission in trust, and with the request that same be placed in a confidential file. Big Three would also show that even absent such conditional delivery in trust, the data furnished is confidential and not subject to disclosure by reason of Section 6(f) of the Federal Trade Commission Act, and Commission Rules 4.10(a)(2) and 4.10(a)(5).

III.

BOC Respondents then moved for a subpoena duces tecum in the captioned cause, which was partially granted by the Order. The subpoena and Order may be broad enough to include certain of the documents and data furnished by Big Three in

connection with File No. 741 0005. Upon learning of the subpoena, on or about April 11, 1974, Big Three duly filed its Application for Protective Relief, such Application being incorporated herein by reference and made a part hereof for all purposes. Thereafter, Big Three appeared through its counsel at the Pre-Trial Conference held in the captioned cause on April 17, 1974. Both in its Application and at the Pre-Trial Conference Big Three objected to production of any such documentation and data because same was furnished in trust and on a confidential basis; because same was furnished in conjunction with File No. 741 0005 and not in conjunction with Docket No. 8955, and accordingly was neither relevant nor material to Docket No. 8955; and finally, because such disclosure would be harmful to Big Three in that it would reveal confidential, sensitive and highly important information to Big Three's competitors, including Airco. For these reasons, Big Three respectfully submits that the Order should be reversed, that BOC Respondents' Motion for a Subpoena Duces Tecum should be denied insofar as it may relate to any documentation or data furnished by Big Three, and that an Order should be entered prohibiting complaint counsel from disclosing to BOC Respondents any documents, responses, or other data furnished by Big Three to the Commission in File No. 741 0005.

IV.

In the alternative, and only in the event it is determined that some of the data so submitted by Big Three should be made available to BOC Respondents in connection with adjudication of the captioned cause, Big Three respectfully submits that the following protective relief should be granted:

A. Pursuant to Commission Rule 3.45, all such data and documentation submitted by Big Three should be made subject to an in camera order, and should not be made public; and

B. The proposed Protective Order set forth at pages 16-17 of the Order of April 23, 1974, should be entered and followed with respect to all documentation and data furnished by Big Three; and

C. An order should be entered directing that the following matters be excised or deleted from all data and documentation submitted by Big Three prior to its examination by independent outside counsel for BOC Respondents and Airco, Incorporated, and prior to its examination by independent designated experts:

1. All names of Big Three's customers;

2. All contract prices, amounts and volumes;

3. All information pertaining to volume and value of industrial gas produced by Big Three, including rates of return for each type of gas;

4. All information pertaining to the capacity to produce industrial gas possessed by any and all of Big Three's facilities;

5. All information pertaining to processes, formulas or procedures utilized by Big Three in the production of industrial gas;

6. All information pertaining to Big Three's sales of industrial gas, including rates of return for each type of gas;

7. All information pertaining to the cost to Big Three of producing industrial gas, including rates of return for each type of gas;

8. All information pertaining to Big Three's plans for expanding or reducing its production and/or distribution of industrial gas;

9. All information concerning the cost of constructing any of Big Three's plants or other facilities.

In connection with the foregoing, Big Three respectfully submits that even if any of the information furnished by Big Three in File No. 741 0005 had some theoretical relevance to the adjudication in Docket No. 8955, there is no justification for disclosure of the names of Big Three's customers, of its trade secrets, or of its commercial and financial information. A compilation of matters such as gross production could be

made without identifying the producing company, the names of its customers, or the capacities of its facilities.

WHEREFORE, PREMISES CONSIDERED, counsel for Big Three Industries, Inc. respectfully prays that the Commission reverse the Order Ruling on Motion of BOC Respondents for a Subpoena Duces Tecum insofar as that Order might require the production of any documents or data furnished by Big Three in connection with File No. 741 0005, or, in the alternative, for entry of orders expressly granting the protective relief set forth in IV A, B, and C above, and for such other and further relief and orders as may be appropriate in the premises.

Respectfully submitted,

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April 30, 1974

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UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

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In the Matter of :

BRITISH OXYGEN COMPANY LIMITED : Docket No. 8955
BOC FINANCIAL CORPORATION
BOC HOLDINGS, LIMITED :
BRITISH OXYGEN INVESTMENTS, LIMITED
AIRCO, INCORPORATED :

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BOC RESPONDENTS' ANSWER TO APPLICATIONS FOR REVIEW

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of BRITISH OXYGEN COMPANY LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED.	Docket No. 8955

To: The Federal Trade Commission

BOC RESPONDENTS' ANSWER
TO APPLICATIONS FOR REVIEW

Preliminary Statement

With the trial of this matter scheduled to begin this very morning - May 6, 1974 - complaint counsel and industry members hostile to the respondents seek interlocutory review in an effort to upset a narrow and carefully drawn order granting respondents a modest amount of discovery under tightly controlled restrictions. In view of the unique circumstances of this case, the order in question can have no practical impact on other Commission proceedings. Moreover, the effect of reversal would be to deprive the

respondents of all pretrial discovery and of materials essential to the effective cross-examination of the Commission's witnesses in a proceeding which places $80 million at risk. Review should be denied in the interest of expedition and fundamental fairness.

Nature of the Proceeding

This proceeding attacks the acquisition by The British Oxygen Company Limited ("BOC")* of 35% of the common stock of Airco, Incorporated ("Airco").

The acquisition was accomplished by public solicitation of tender offers in December 1973. The complaint, filed on February 26, 1974, charges that the acquisition violated section 7 of the Clayton Act and section 5 of the Federal Trade Commission Act by unreasonably restraining trade and substantially lessening competition in four alleged lines of commerce -- industrial gases, inhalation anesthetic equipment, inhalation therapy equipment and medical pipeline systems -- and removed BOC as a potential entrant into the welding equipment field. At a prehearing conference on April 25, 1974, complaint counsel announced that they intended to introduce no evidence on the medical pipeline and welding aspects of the complaint, thus in effect dropping any charges concerning those two areas. (Transcript pp. 134, 135).

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* The respondents British Oxygen Company Limited, BOC Financial Corporation, BOC Holdings, Limited and British Oxygen Investments, Limited are hereinafter referred to collectively as the "BOC respondents."

Complaint counsel's industrial gases case, the only aspect relevant here, is based exclusively on the potential competition doctrine. Airco produces and sells industrial gases in the United States. BOC does so in the United Kingdom, but not in the United States. Complaint counsel assert that BOC was a potential entrant into the industrial gases field in the United States and that its acquisition of an interest in Airco removes it as a potential competitor.

The Industrial Gases Industry Investigation

The Commission's attack on the BOC-Airco acquisition is a direct outgrowth of an industry-wide investigation of the industrial gases industry in which the Commission had been engaged since April 1973.*

During the course of its on-going investigation of the gases industry, the Commission has accumulated a good deal of information in response to letters addressed to firms in the industry requesting voluntary production of documents as well as access to the companies' files in order to examine

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* Affidavit of Robert O. Reck, filed as Exhibit I to Commission's Application for Temporary Restraining Order and Preliminary Injunction, FTC v. British Oxygen Company Limited, et al., civil action no. 74-31 (D. Del.) 1974.

and copy documents.* Much of the information solicited in the letters and otherwise accumulated is highly relevant to the definition of the market and assessment of the present and future state of competition in the industry, including such factors as the amount of total industry production capacity, the amount of total industry sales, the market shares of leading firms, trends toward concentration or deconcentration, rates of return, price history and structure, and similar matters.

Although complaint counsel would now have the Commission believe that the prosecution of the instant matter is wholly distinct and separate from the industry-wide investigation,** complaint counsel's own papers reveal that in fact they are inseparable. For example, the Commission's Memorandum of Points and Authorities in support of its application to the United States District Court for the District of Delaware for a temporary restraining order and preliminary injunction states

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* See, for example, the letter addressed to Richard V. Giordano, President of Airco, attached as Exhibit A to BOC Respondents' Motion for a Subpoena Duces Tecum.

** See Complaint Counsel's Application for Review of Order Requiring Production of Documents from the Commission's Files, p. 10. Also see, e.g., Chemetron Corporation's Application for Interlocutory Appeal from Administrative Law Judge's Rule, p. 3.

that the hearings concerning the tender offer were "conducted . . . as part of the Commission's overall investigation of a major industry", that "information obtained in the investigation indicated that BOC's acquisiton . . . would have serious anti-competitive consequences for the industrial gas market," and that "the investigation revealed" that BOC's acquisition might injure competition.*

The Expedited Nature of This Proceeding

Contemporaneously with the filing of the complaint in this proceeding, the Commission sought a temporary restraining order and preliminary injunction from the United States District Court for the District of Delaware pursuant to Section 13(b) of the Federal Trade Commission Act. 15 U.S.C. § 53(b).

The Court granted limited injunctive relief on the condition that the Commission expedite the administrative proceeding and file a quarterly report with the Court reporting progress and the cause, if any, of delays.** Subsequently the

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* FTC v. British Oxygen Company Limited et al., civil action no. 74-31 (D. Del. 1974), p. 4,5 (emphasis added).

** FTC v. British Oxygen Company Limited et al., civil action no. 74-31 (D. Del. 1974), preliminary injunction, pp. 4, 5.

Commission itself ordered that these proceedings be expedited.* Accordingly, the trial of this proceeding was set for April 22, less than two months after filing of the complaint. On April 17, 1974, after BOC's discovery motion was filed, the trial was adjourned until May 6, 1974.

BOC Respondents' Discovery Motion

On March 19, 1974, less than three weeks after the filing of the complaint, BOC respondents moved for issuance of a subpoena duces tecum requiring production by the Commission of documents relevant to this matter and necessary to the defense of this case which the Commission had gathered from third parties during its industrial gas industry investigation.**

The major premise of BOC's motion was that discovery from third parties of the materials which the Commission had already gathered from those in the industry was not possible as a practical matter. With the trial then one month away,

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* Commission's Order Denying Motion for Fixed Schedule, dated April 2, 1974.

** In fact, BOC respondents sought such discovery at the first prehearing conference on March 12, 1974. A formal application was withheld at the request of the Administrative Law Judge in order to seek voluntary discovery from complaint counsel. (Transcript, pp. 19-21) That effort failed entirely when complaint counsel refused to make any significant disclosures.

multiple requests and negotiations, applications for subpoenas, litigation of subpoena enforcement proceedings, and appeals would simply take too long and impose too great a burden on the preparation of a defense.

On April 23, 1974, Judge Barnes issued an order* requiring the Commission to produce for BOC respondents some of the documents originally sought. Judge Barnes' decision included specific findings that each category of documents ordered produced was relevant to issues in this proceeding.

Judge Barnes' order was carefully drawn to make unmistakably clear that this discovery of third party documents in the hands of the Commission was an extraordinary response to a unique situation, and was not intended to sanction such discovery under usual circumstances. The special discovery was warranted in this matter, according to Judge Barnes, only by the coalescence of several factors: (1) the expedited schedule for the proceeding; (2) the recent industry-wide investigation; and (3) the ready availability of easily identifiable and highly relevant documentary evidence. As Judge Barnes stated:

> "The Commission is under Court order to expedite this proceeding. The undersigned is of the opinion that, where the

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* Order Ruling on Motion of BOC Respondents.

> Commission has made a recent investigation of the industrial gas industry and has readily available clearly identifiable and highly relevant documentary evidence which may be useful to respondents, the requirement that respondents first exhaust third-party sources before seeking documents in the Commission's possession would unnecessarily delay the trial of this matter. It obviously would not be a step toward expediting the trial. The undersigned is accordingly ruling that certain documentary materials in the Commission's files be made available to BOC, as set forth hereinafter." (Order ruling on motion, p. 8.)

The interests of third parties in the confidentiality of the documents ordered disclosed were safeguarded by an onerous protective order consented to by respondents.

THERE IS NO NEED FOR INTERLOCUTORY REVIEW

The major reason for denying interlocutory review is that there is simply no need or basis for it.

Judge Barnes' order is carefully limited to the unique circumstances of this case. Rather than permitting a wholesale fishing expedition by respondents' counsel into complaint counsel's files in every case, Judge Barnes permitted discovery only of third party documents obtained as part of a recent industry investigation of indisputable relevance to the current proceeding and only where time pressures necessitated by a requirement of expedition of the trial

made discovery from third parties impracticable. Hence, contrary to complaint counsel's suggestion, there is no need for the Commission to step in here to prevent wholesale disruption of Commission proceedings across the board.

Moreover, the protective order issued below provides more than adequate protection for any legitimate interests of third parties in the confidentiality of the documents in question. Infra, pp. 14, 15.

APPLICANTS FOR REVIEW HAVE NOT DEMONSTRATED AN ABUSE OF DISCRETION BELOW.

Although BOC respondents reserve a full discussion of the merits of applicants' objections for future briefing in the event that review is granted, the following demonstrates that the contentions of applicants for review are without merit. Since interlocutory review of discovery orders is available only on a showing of an abuse of discretion (Maremount Corp., 77 F.T.C. 1654, 1656, 1657 [1970]), review should be denied.

Exhaustion of Third Party Sources Would Serve No Useful Purpose

Complaint counsel's most vehement objection to Judge Barnes' order is the claim that Judge Barnes erred in

failing to require BOC to fully exhaust third party sources before discovering documents from the Commission's files.

Any attempt to acquire the necessary discovery through voluntary compliance of third parties was clearly doomed to failure in this case. As Judge Barnes found, the time pressures involved simply left no time for pursuing third parties. Moreover, Judge Barnes gave third parties notice of BOC's application, and thus an opportunity for voluntary compliance. But by the time the discovery order was handed down, ten third parties had registered their opposition to BOC's request. To have required BOC respondents to seek voluntary disclosure from each company manufacturing a gas for industrial use, or to require it now, in the face of such universal and adamant opposition would be to exalt form over substance.

In addition, to have required BOC respondents to seek compulsory process against each recalcitrant third party would have compounded the waste of time and effort. Judge Barnes found that the production of the relevant documents requested would have been compelled regardless of confidentiality had BOC subpoenaed them directly from third parties. The procedure adopted by Judge Barnes gave to each third party the full rights it would have received through

service of individual subpoenas, including ten days' notice to move to limit or quash, opportunity for oral argument, and protection of confidential documents by protective order. Such a consolidated treatment was precisely the sort of resourceful expedition necessary to implement the order of the Commission and to satisfy the condition of the District Court.

The Documents Are Relevant and Necessary To BOC Respondents' Case

Complaint counsel further allege that BOC respondents failed to show a "compelling need" for the information ordered produced by Judge Barnes. In support of this objection, complaint counsel disputes the relevance of the information and invokes the legitimate concern of third parties over disclosure of confidential information.

To begin with, BOC respondents are not required to show "compelling need" for discovery of records of the Commission. Section 3.36(b) of the Rules of Practice require only a showing of general relevancy, reasonableness, and unavailability from other sources.

We have already demonstrated the practical unavailability of these documents from other sources. And while we reserve discussion of the particular specifications of the subpoena for our brief in the event review is granted,

complaint counsel's objection on the grounds of relevance is without merit. The relevancy of every document sought by BOC respondents is demonstrated in the first instance by the fact that the Commission itself thought it was relevant to the investigation out of which this matter arose.

Moreover, the discovery ordered by Judge Barnes is far from the wholesale file-emptying which complaint counsel would have the Commission believe. On the contrary, the documents ordered produced represent only a fraction of the documents in the Commission's files and available to complaint counsel. Only the most relevant categories of documents from among those requested in the Commission's investigation were initially requested by BOC respondents. Of these, several were voluntarily waived during the March 28 pre-trial conference. Of the remaining categories requested Judge Barnes granted discovery of only about half. Thus, the documents finally ordered produced represent only the nuggets exposed after repeated sifting of the Commission's rich lode of industry data.

Most of the documents ordered produced are clearly relevant to one or more of the classic issues of fact underlying Clayton Act Section 7 litigation -- definition of product and geographic markets, calculation of the size of

total markets and market shares of current competitors, determination of likely potential entrants, and definition and evaluation of factors affecting ease of entry now and in the future. Others, such as the rates of return of companies in the U.S. gases business, are necessary for the cross-examination of witnesses from those companies who are scheduled to testify for complaint counsel -- presumably to the effect that they regarded BOC as a likely entrant into the field.* Surely evidence that the employer of a witness is making 1% on its gases investment is relevant to the credibility of the witness's claim that he perceived foreign entry as being likely.

Implicit in complaint counsel's argument that BOC has no need for the discovery is the suggestion that BOC respondents are entitled to less information than the Commission has at its disposal. Approval of this notion would be inconsistent with the principle that full and complete disclosure is the best way to achieve fair and efficient litigation of civil issues. More seriously, the denial of discovery here would be particularly arbitrary and capricious.

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* Complaint counsel's witness list includes at least one witness from each of the ten companies which objected to this discovery (listed at p. 6 of Judge Barnes' order) except National Welders Supply Co. and Whitmore Oxygen Co.

Had BOC's acquisition of Airco been challenged by the Department of Justice, which has concurrent jurisdiction over Clayton Act Section 7 cases, the litigation would have taken place in a United States District Court where BOC respondents would have been entitled to full and complete discovery of the Government's case. Denial of such discovery by virtue of the fortuitous circumstance that this acquisition has been attacked by the Federal Trade Commission rather than the Department of Justice would be a denial of due process and equal protection of the law. See Bolling v. Sharpe, 347 U.S. 497 (1953); Communist Party of the United States v. Subversive Activities Control Board, 254 F.2d 314 (D.C. Cir. 1958); Avnet, Inc., Trade Reg. Rep. ¶ 19,282 (FTC 1970).

The Interests of Third Parties in Confidentiality Are Fully Protected

Third party interests in protecting confidential business information has been carefully weighed by Judge Barnes throughout his consideration of BOC respondents' discovery motion. As a result of BOC's offer to consent to any reasonable protective order and of the requests of third parties, a rigorous protective order has been entered. The order limits access to the documents to independent

counsel and bars disclosure to any director, officer, or employee of Airco or the BOC respondents of any information contained in the documents produced. In addition, the protective order provides for in-camera treatment of any sensitive documents adduced at trial. In short, the interests of third parties have been amply protected, perhaps beyond the extent to which they are entitled. Given the broad discretion of the Administrative Law Judge "to create protective provisions based on the facts and circumstances of each case" (Maremount Corp., 74 F.T.C. 1642, 1643 [1968]), the confidentiality issue provides no basis for granting interlocutory review.

CONCLUSION

For the foregoing reasons, the pending applications for review should be denied. In the event review is granted, BOC respondents request that this matter be set down for full briefing and oral argument on an expedited basis.

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By _____
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Of Counsel

Dated: New York, New York
May 6, 1974

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED.	DOCKET NO. 8955

To: The Honorable Ernest G. Barnes,
Administrative Law Judge.

BOC RESPONDENTS' RESPONSE TO
COMPLAINT COUNSEL'S SUPPLEMENTAL
REQUEST FOR ADMISSION OF FACTS

Pursuant to Section 3.31 of the Commission's Rules of Practice, BOC respondents hereby respond to complaint counsel's supplemental request for admission of facts as follows:

REQUEST NO. 1

The 1973 combined sales in terms of dollars of industrial gas of BOC [footnote omitted] and Airco account for more than the sales of industrial gas of any other producer of industrial gas. [Footnote: For purposes of this request, sales should be measured on a world-wide basis.]

RESPONSE

Objected to on the ground that world-wide sales are irrelevant and immaterial to this proceeding.

REQUEST NO. 2

In 1972, BOC was the leading producer, in terms of net sales, of inhalation anesthetic equipment in the United Kingdom.

RESPONSE

Objected to on the ground that the request seeks an admission which is neither relevant nor material to this proceeding.

REQUEST NO. 3

In 1973, BOC was the leading producer, in terms of net sales, of inhalation anesthetic equipment in the United Kingdom.

RESPONSE

Objected to on the same grounds as Request No. 2.

REQUEST NO. 4

At the time of the acquisition of Airco stock by BOC, BOC was the leading producer, in terms of the volume of net sales, of inhalation therapy equipment in the United Kingdom.

RESPONSE

Objected to on the same grounds as Request No. 2.

REQUEST NO. 5

At the time of the acquisition of Airco stock by BOC, BOC was one of the four largest suppliers, in terms of the volume of net sales, of inhalation therapy equipment in the European Economic Community.

RESPONSE

Objected to on the same grounds as Request No. 2.

REQUEST NO. 6

In 1972, BOC was the second largest producer, in terms of the volume of net sales, of industrial gases in the world.

RESPONSE

Objected to on the same grounds as Request No. 2.

REQUEST NO. 7

The term "anesthetic equipment" as used in responses 58, 59, and 60 to Complaint Counsel's Request for Admission has the meaning given to it in the complaint issued in this proceeding.

RESPONSE

DKI.*

REQUEST NO. 8

On or about November 22, 1972, Mr. J. Shanks of BOC met with Lord Hall and discussed the possibility of an American banking consortium buying Chemetron and selling their medical equipment business to BOC.

RESPONSE

Denied, except admit that proposed CX-261 was prepared by M. J. Shanks of BOC on or about the date thereof and that the statements of fact contained therein are believed to be true.

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* "DKI" means that respondents lack sufficient information or knowledge to enable them to admit or deny after reasonable inquiry.

REQUEST NO. 9

The author of proposed CX-264 is J. A. Perham.

RESPONSE

Admitted.

REQUEST NO. 10

The author of proposed CX-266 is J. A. Perham.

RESPONSE

Admitted.

REQUEST NO. 11

The initials "JAP" on proposed CX-267-B are those of J. A. Perham.

RESPONSE

Admitted.

REQUEST NO. 12

On or about February 15, 1973, Stevenson Taylor, President of Harris Calorific Company, inquired of Air Products and Chemicals Inc. whether it might be willing to divest itself of Forreger Melco.

RESPONSE

DKI, except admit that proposed CX-272 was received by J. A. Perham on or about the date thereof.

REQUEST NO. 13

On or about February 15, 1973, Stevenson Taylor communicated with Air Products and Chemicals Inc. on behalf of BOC.

RESPONSE

DKI, except admit that J. A. Perham of Canox received proposed CX-272 from Stevenson Taylor.

5

REQUEST NO. 14

In 1973, a BOC Managing Director contacted Air Products and Chemicals Inc. about the possible sale of Forreger to BOC.

RESPONSE

Denied.

REQUEST NO. 15

On or about September 3, 1973, BOC expressed an interest to Mr. Bollinger in obtaining information concerning any company in the medical equipment field which Neiderhoffer, Cross & Zeckhauser, Inc. represented.

RESPONSE

Denied, except admit that proposed CX-287 was prepared by an employee of BOC and sent to Mr. Bollinger on or about the date thereof.

REQUEST NO. 16

In 1973, BOC inquired of R. L. Boyd Company whether any medical companies were for sale in the United States.

RESPONSE

Denied, except admit that proposed CX-290-A was prepared by an employee of BOC and sent to R. L. Boyd Company on or about the date thereof.

REQUEST NO. 17

In October, 1968, J. A. Perham of Canox proposed major acquisitions in the United States with the aid of BOC financial support.

RESPONSE

Denied, except admit that proposed CX-208 was prepared by J. A. Perham of Canox on or about October 1, 1968.

REQUEST NO. 18

In or about October 1968, on behalf of BOC, J. A. Perham of Canox was establishing contacts with two Bird distributors with a view toward BOC's acquisition of them within the next two years.

RESPONSE

Objected to on the ground that the request is not limited to distributors located or operating in the United States and therefore seeks an admission with respect to matters irrelevant and immaterial to this proceeding.

REQUEST NO. 19

The initials J.A.P. on proposed exhibit CX-210 are those of J. A. Perham of Canox.

RESPONSE

Admitted.

REQUEST NO. 20

On or about June 30, 1969, J. A. Perham of Canox, on behalf of BOC advised Mickey Loveman of Burdett of Cleveland that BOC might be interested in acquiring some Burdett operations.

RESPONSE

DKI, except admit that on or about October 9, 1970, J. A. Perham of Canox prepared and sent proposed CX-245 to S. Michael Loveman of Burdett of Cleveland.

REQUEST NO. 21

In or about November 1969, BOC determined that further study seemed justified with regard to possible entry into the United States industrial gas industry through either: establishment or acquisition of one or a few distributorships and their use as a base for vertical or horizontal expansion; or merger with a number of local distributors to form or with the aim of eventually forming an integrated production and distribution system.

RESPONSE

Denied, except admit that in or about November 1969, a BOC employee prepared proposed CX-217.

REQUEST NO. 22

On or about December 1, 1969 BOC observed that Chemetron was a very much larger concern than BOC had envisaged as a target for acquisition for the early stages of BOC participation in the United States industrial gases market.

RESPONSE

Denied, except admit that on or about December 1, 1969, a BOC employee prepared proposed CX-218.

REQUEST NO. 23

On or about December 1, 1969, BOC considered a minority BOC holding in Chemetron as establishing a platform for BOC growth in North America.

RESPONSE

Denied, except admit that on or about December 1, 1969, a BOC employee prepared proposed CX-218.

REQUEST NO. 24

On or about December 18, 1969, J. M. Williams of BOC contacted R. Johnson of Loeb, Rhoades & Co., with regard to arranging a meeting between J. M. Williams and J. Gallagher, President of Chemetron.

RESPONSE

Denied, except admit that on or about December 18, 1969, J. M. Williams of BOC prepared and sent proposed CX-221 to Mr. R. Johnson of Loeb, Rhoades & Co.

REQUEST NO. 25

The initials JMW on proposed exhibit CX-223-A,C are those of John M. Williams of BOC.

RESPONSE

Admitted.

REQUEST NO. 26

In or about December 1969, BOC advised R. S. Johnson of Loeb, Rhoades & Co., that BOC could be interested in part-purchase of Chemetron, aimed at eventual control.

RESPONSE

Denied, except admit that proposed CX-225 was prepared on or about the date thereof by L. E. Smith of BOC.

REQUEST NO. 27

On or about January 22, 1970, J. M. Williams of BOC contacted Robert S. Johnson, affirming BOC's continued interest in exploring possible acquisition of Chemetron in the event that Chemetron would reconsider such a control position.

RESPONSE

Denied, except admit that J. M. Williams of BOC prepared and sent proposed CX-226 to Robert S. Johnson of Loeb, Rhoades & Co on or about the date thereof.

REQUEST NO. 28

On or about January 23, 1970, I. Greenfield of BOC met with E. J. Muller, President, and Russ McPherson, Vice President of Unex Welding Supply of Elizabeth, New York as part of an investigation of the industrial gases industry in the United States conducted by J. A. Perham and I. Greenfield on behalf of BOC.

RESPONSE

Denied, except admit that on or about January 23, 1973, I. Greenfield of BOC met with E. J. Muller, President, and Russ McPherson, Vice President of Unex Welding Supply of Elizabeth, New Jersey, as part of an investigation of the U.S. scene in the industrial gases and welding supplies fields conducted by J. A. Perham and I. Greenfield on behalf of BOC.

REQUEST NO. 29

On or about January 23, 1970, I. Greenfield of BOC met with Edwin S. Cansdale, President, and Mrs. E. S. Cansdale, Director of Middlesex Welding Sales Co., Inc., of North Brunswick, New Jersey as part of an investigation of the industrial gases industry in the United States conducted by J. A. Perham and I. Greenfield on behalf of BOC.

RESPONSE

Denied, except admit that on or about January 23, 1970, I. Greenfield of BOC met with Edwin S. Cansdale, President, and Mrs. E. S. Cansdale, Director of Middlesex Welding Sales Co., Inc., of North Brunswick, New Jersey, as part of an investigation of the U.S. scene in the industrial gases and welding supplies fields conducted by J. A. Perham and I. Greenfield on behalf of BOC.

REQUEST NO. 30

On or about January 26, 1970, J. A. Perham, President of Canox, and I. Greenfield of BOC met with Vern K. Miller, President, and Ray Toren, General Manager of H. K. Miller, Inc. of Chicago, Illinois as part of an investigation of the industrial gases industry in the United States conducted by J. A. Perham and I. Greenfield on behalf of BOC.

RESPONSE

Denied, except admit that on or about January 26, 1970, J. A. Perham, President of Canox, and I. Greenfield of BOC met with Vern K. Miller, President, and Ray Toren, General Manager of H. K. Miller, Inc. of Chicago, Illinois, as part of an investigation of the U.S. scene in the industrial gases and welding supplies fields conducted by J. A. Perham and I. Greenfield on behalf of BOC.

REQUEST NO. 31

On or about January 28, 1970, J. A. Perham, President of Canox and I. Greenfield of BOC met with Don S. Giles of Delta Welding Supplies of Stockton, California as part of an investigation of the industrial gases industry in the United States conducted by J. A. Perham and I. Greenfield on behalf of BOC.

RESPONSE

Denied, except admit that on or about January 28, 1970, J. A. Perham, President of Canox, and I. Greenfield of BOC, met with Don S. Giles of Delta Welding Supplies of Stockton, California, as part of an investigation of the U.S. scene in the industrial gases and welding supplies fields conducted by J. A. Perham and I. Greenfield on behalf of BOC.

REQUEST NO. 32

On or about January 29, 1970, J. A. Perham, President of Canox and I. Greenfield of BOC met with William L. Arter, Sales Manager of Absco Welding Equipment of Torrance, California as part of an investigation of the industrial gases industry in the United States conducted by J. A. Perham and I. Greenfield on behalf of BOC.

RESPONSE

Denied, except admit that on or about January 29, 1970, J. A. Perham, President of Canox, and I. Greenfield of BOC, met with William L. Arter, Sales Manager of Absco Welding Equipment of Torrance, California, as part of an

investigation of the U.S. scene in the industrial gases and welding supplies field conducted by J. A. Perham and I. Greenfield on behalf of BOC.

REQUEST NO. 33

On or about January 29, 1970, J. A. Perham, President of Canox and I. Greenfield of BOC met with Earl Elson of Gordon Duff, Inc. of Los Angeles, California as part of an investigation of the industrial gases industry in the United States conducted by J. A. Perham and I. Greenfield on behalf of BOC.

RESPONSE

Denied, except admit that on or about January 29, 1970, J. A. Perham, President of Canox, and I. Greenfield of BOC, met with Earl Elson of Gordon Duff, Inc. of Los Angeles, California, as part of an investigation of the U.S. scene in the industrial gases and welding supplies fields conducted by J. A. Perham and I. Greenfield on behalf of BOC.

REQUEST NO. 34

On or about January 29, 1970, J. A. Perham, President of Canox and I. Greenfield of BOC met with Richard E. Bogard of Anderson Equipment Co. of Los Angeles, California as part of an investigation of the industrial gases industry in the United States conducted by J. A. Perham and I. Greenfield on behalf of BOC.

RESPONSE

Denied, except admit that on or about January 29, 1970, J. A. Perham, President of Canox, and I. Greenfield

of BOC, met with Richard E. Bogard of Anderson Equipment Co. of Los Angeles, California, as part of an investigation of the U.S. scene in the industrialgases and welding supplies fields conducted by J. A. Perham and I. Greenfield on behalf of BOC.

REQUEST NO. 35

In 1970, J. M. Williams, on behalf of BOC, expressed to Peter Grant that BOC might be interested in acquiring control of Burdett Oxygen Company of Cleveland.

RESPONSE

Denied, except admit that on or about April 30, 1970, J. M. Williams, on behalf of BOC, prepared and sent proposed CX-234 to P. J. Grant.

REQUEST NO. 36

In September and October 1970, J. A. Perham on behalf of BOC, indicated an interest in the acquisition of the Niagra Falls, New York air separation plant of Burdett Oxygen Company of Cleveland.

RESPONSE

Denied, except admit that on or about October 9, 1970, J. A. Perham, President of Canox, prepared proposed CX-245 and sent it to S. Michael Loveman of Burdett of Cleveland.

REQUEST NO. 37

In June 1969, J. A. Perham, on behalf of BOC, expressed an interest to Kevin Bradley of Dean Witter

& Co., Inc. in the method of acquisition employed by L'Air Liquide in acquiring American Cryogenics.

RESPONSE

Denied, except admit that on May 27, 1969, at a meeting attended by Kevin J. Bradley of Dean Witter & Co. and others, J. A. Perham, President of Canox asked what the arrangements were when L'Air Liquide purchased American Cryogenics from Standard Oil of New Jersey.

REQUEST NO. 38

In September and October 1971, references given by C.D.L. Perkins, of Burdett Oxygen Company of Norristown were checked by J. A. Perham on behalf of BOC.

RESPONSE

Denied, except admit that in October 1971, J. A. Perham of Canox telephoned a number of persons given as references by C.D.L. Perkins of Burdett Oxygen Company of Norristown with respect to their opinions of Mr. Perkins and prepared proposed CX-255-A and sent it to I. Temple Roberts of BOC.

Dated: May 13, 1974

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By _____
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Jay H. Topkis
Lewis A. Kaplan
Moses Silverman
Of Counsel.

VERIFICATION

STATE OF NEW YORK)
: ss.:
COUNTY OF QUEENS)

PETER LAISTER, being duly sworn, says:

1. I am a Director of British Oxygen Company Limited.

2. I have read the foregoing BOC Respondents' Response to Complaint Counsel's Supplemental Request for Admission of Facts. Said response is true to the best of my information and belief.

Peter Laister

Subscribed and sworn to before
me this 13th day of May, 1974.

Lewis A. Kaplan
Notary Public, State of New York
No. 60-7158700
Qualified in Westchester County
Commission Expires March 30, 1976

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED.	Docket No. 8955 AMENDED ANSWER

The British Oxygen Company Limited ("BOC"), BOC Financial Corporation ("BOC Financial"), BOC Holdings Limited ("BOC Holdings") and British Oxygen Investments Limited ("BO Investments"), for their answer to the complaint:

1. Deny the allegations contained in paragraph 1, except admit that the terms "industrial gases," "inhalation anesthetic equipment," "inhalation therapy equipment," and "medical pipeline systems," as used in the complaint, have the meanings alleged in paragraph 1.

2. Admit the allegations contained in paragraph 2.

3. Admit the allegations contained in paragraph 3.

4. Deny the allegations contained in paragraph 4.

5. Deny the allegations contained in paragraph 5, except admit that, in or about October 1973, BOC established Medishield, Inc., a Delaware corporation, and that Medishield, Inc. presently owns all of the common stock of Harris-Lake, Inc. and Fraser Sweatman, Inc., which are domestic corporations, and Fraser Sweatman (Canada) Limited, a Canadian corporation.

6. Deny the allegations contained in paragraph 6, except admit that BOC manufactures and distributes in the United Kingdom one or more types of inhalation anesthetic equipment as that term is defined in paragraph 1(b) of the Complaint.

7. Deny the allegations contained in paragraph 7, except admit that Harris-Lake, Inc., and Fraser Sweatman, Inc., are indirect subsidiaries of BOC and that each assembles and distributes in the United States one or more types of inhalation anesthetic equipment as that term is defined in paragraph 1(b) of the Complaint.

8. Deny the allegations of paragraph 8, except admit that (a) BOC manufactures and distributes in the United Kingdom one or more types of inhalation therapy equipment, as that term is defined in paragraph 1(c) of the Complaint, (b) Harris-Lake, Inc., is an indirect subsidiary of BOC, and (c) Harris-Lake, Inc., markets in the United States one or more types of inhalation therapy equipment as that term is defined in paragraph 1(c) of the Complaint.

9. Deny the allegations contained in paragraph 9, except admit that BOC manufactures and supplies medical pipeline systems in the United Kingdom.

10. Deny the allegations contained in paragraph 10, except admit that BOC produces industrial gas in a number of countries.

11. Deny the allegations contained in paragraph 11, except admit that Harris-Lake, Inc., and Fraser Sweatman, Inc., have sold and shipped products in interstate commerce and engaged in commerce within the meaning of the Clayton Act and the Federal Trade Commission Act.

12. Admit the allegations contained in paragraph 12.

13. Admit the allegations contained in paragraph 13.

14. Admit the allegations contained in paragraph 14.

15. Deny the allegations contained in paragraph 15, except admit that the term "BOC," as used in the complaint, includes all subsidiary or related corporation and all successor corporations.

16. Admit the allegations contained in paragraph 16.

17. Admit the allegations contained in the first and second sentences of paragraph 17 and deny, on information and belief, the allegations contained in the third sentence of paragraph 17.

18. Deny the allegations contained in paragraph 18, except admit that Airco operations involving inhalation anesthetic equipment, inhalation therapy equipment, and medical pipeline equipment, as those terms are defined in the complaint, are conducted through its Ohio Medical Products Division.

19. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 19 and 20.

20. Admit the allegations of paragraph 21.

21. Deny the allegations of paragraph 22, except admit that Airco and BOC entered into written agreements on or about July 25, 1973 and December 10, 1973, and that BOC Financial made a written tender offer for shares of the common stock of Airco on or about December 10, 1973, and refers to those documents for the terms thereof, and admits that BOC Financial accepted four million shares pursuant thereto.

22. Deny the allegations contained in paragraph 23, except admit the allegations contained in the fifth sentence of paragraph 23.

23. Deny the allegations contained in the first, fourth, fifth, and seventh sentences of paragraph 24. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in the second, third and sixth sentences of paragraph 24.

24. Deny the allegations contained in paragraph 25.

25. Deny the allegations contained in the third and fourth sentences of paragraph 26. Deny knowledge or information sufficient to form a belief as to the first, second, fifth and sixth sentences of paragraph 26.

26. Deny the allegations contained in paragraph 27 and 28.

FIRST DEFENSE

27. The Federal Trade Commission was aware of the proposed acquisition of stock of Airco by BOC before the acquisition was consummated.

28. The Federal Trade Commission did not seek to prevent the acquisition of stock of Airco by BOC before that acquisition was consummated.

29. In reliance on the failure of the Federal Trade Commission to seek to prevent its acquisition of stock of Airco, BOC invested about $80 million in the stock of Airco.

30. If the relief sought by the Federal Trade Commission is granted, BOC will sustain great injury.

31. This proceeding is barred by the doctrines of laches, estoppel and/or waiver.

Dated: May 23, 1974

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By: _____
Jay H. Topkis

Attorneys for The British Oxygen Company Limited, BOC Financial Corporation, BOC Holdings, Ltd., and British Oxygen Investments, Ltd.
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Lewis A. Kaplan
Moses Silverman

Of Counsel.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Lewis A. Engman, Chairman
Paul Rand Dixon
Mayo J. Thompson
M. Elizabeth Hanford

In the Matter of BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED AIRCO, INCORPORATED.	DOCKET NO. 8955 ORDER GRANTING APPLICATIONS FOR REVIEW

By order dated April 23, 1974, the Administrative Law Judge granted a motion by respondents, British Oxygen Company, Limited, BOC Financial Corporation, BOC Holdings, Limited, and British Oxygen Investments, Limited (hereinafter BOC), for production, pursuant to §3.36 of the Commission's Rules of Practice, of certain documents obtained in a Commission investigation of the industrial gas industry. Pursuant to §3.23(a)(1) of the Rules, complaint counsel request that the Commission review this order on the grounds that BOC failed to make certain showings required by §3.36. Review is also sought by five companies who voluntarily submitted documents in connection with said investigation, and who are not parties to this matter but are participating with the permission of the Administrative Law Judge.

The rulings of an Administrative Law Judge on issues of this kind are entitled to great weight and will be reviewed only upon a showing that he has abused his discretion. Warner Lambert Co., Dkt. 8891 (September 18, 1973). We find no such abuse of discretion in the Law Judge's ruling on the instant motion to produce and it will be affirmed. We are concerned, however, that the maximum protection consistent with a just determination of the issues be afforded to the more sensitive

portions of the material in question and will accordingly direct that the Law Judge accord sensitive information the so-called "Mississippi River" type treatment, i.e., submittal to an independent accounting firm for analysis and aggregation so as to avoid the disclosure of individual firm data of great competitive sensitivity. Accordingly,

IT IS ORDERED that the order of the Administrative Law Judge, dated April 23, 1974, be, and it hereby is, placed on the Commission's docket for review;

IT IS FURTHER ORDERED that the Administrative Law Judge's order of April 23, 1974, be, and it hereby is, upheld;

IT IS FURTHER ORDERED that the Administrative Law Judge accord the above-described confidential treatment to the sensitive portions of the documents whose production is required by his order of April 23, 1974.

By the Commission.

SEAL

Virginia M. Harding
~~Charles A. Tobin,~~
Acting Secretary.

ISSUED: May 29, 1974

RECEIVED
JUL 17 1974
SECRETARY

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED.	DOCKET NO. 8955

ORDER INCORPORATING INTO RECORD RESULTS OF INFORMAL CONFERENCE OF JUNE 10, 1974

On June 10, 1974, an informal conference was held by the Administrative Law Judge and counsel for the parties to consider the appropriate manner in which to comply with the Commission's Order Granting Application for Review dated May 29, 1974. In its Order, the Commission affirmed the Administrative Law Judge's Order of April 23, 1974, making available to respondents certain documents in the Commission's files. The Commission also directed that the Administrative Law Judge should accord sensitive information contained in the documentary materials "Mississippi River" treatment.

At the informal conference, respondents' counsel waived production of the following categories of documents which were ordered made available to respondents:

1. Documents showing plant capacity.

2. Net sales to direct industrial accounts.

3. Exchange agreements between industrial gas companies.

4. Documents indicating industrial gas accounts obtained by an industrial gas producer while such account was under contract with another producer.

The Administrative Law Judge determined to accord "Mississippi River" treatment to the following categories of documents:

(1) Documents showing actual production of industrial gas by cubic feet and in dollar amounts.

(2) Net sales of each industrial gas.

(3) Rates of return of each industrial gas.

The balance of the material which the undersigned ordered to be made available to respondents was physically turned over to respondents for examination. Respondents selected various documents from this material for copying.

It was later agreed that the documents accorded "Mississippi River" treatment would be turned over to the accounting firm of Price, Waterhouse & Co., 1801 "K" Street, N.W., Washington, D.C., for purposes of compiling the documents to be accorded the special treatment in a form which would not reveal the information about each individual company. The official from Price, Waterhouse & Co., who was placed in charge of the accounting work, was Mr. Thomas Foster.

Mr. Foster, on June 14, 1974, appeared at the formal hearings in New York, N.Y., and presented to the undersigned the tabulations which he had prepared in accordance with instructions from the undersigned. These tabulations were made available to respondents' counsel for use in the trial of this matter.

Ernest G. Barnes

Ernest G. Barnes,
Administrative Law Judge.

June 17, 1974

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED, AIRCO, INCORPORATED.	Docket No. 8955

BOC RESPONSE TO COMPLAINT COUNSEL'S OFFER OF DOCUMENTS FROM STANFORD RESEARCH INSTITUTE INTO EVIDENCE

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of BRITISH OXYGEN COMPANY, LIMITED, BOC FINANCIAL CORPORATION, BOC HOLDINGS, LIMITED, BRITISH OXYGEN INVESTMENTS, LIMITED AIRCO, INCORPORATED.	)	Docket No. 8955

TO: HONORABLE ERNEST G. BARNES
Administrative Law Judge

BOC RESPONSE TO COMPLAINT COUNSEL'S OFFER OF DOCUMENTS FROM STANFORD RESEARCH INSTITUTE INTO EVIDENCE

BOC has no objection to the receipt in evidence of CX 342A-F provided that BOC RX 257, 258, 259 and 260A-F are received simultaneously. CX 342A-F are offered to establish two propositions. BOC RX 257-260 are the total rebuttal. We respectfully suggest that, if complaint counsel's exhibits are to be received the rest of the story should come in as well.

It will be recalled that Dr. Kridl testified (2121):

> "During my year and a half tenure with SRI, we did a thorough study of the United States industrial gas market for a United States company that was -- the report was finished in early '73, and in the middle

> of 1973 we did a thorough study of the worldwide industrial gas market, including the United States, for a foreign company."

Complaint counsel evidently offer CX 342A-F to attack Dr. Kridl's credibility by showing (a) that he could not have been involved in the study done for the United States company because it was done before his tenure and does not bear his name; and (b) that the study done for a foreign company did not cover the United States. Neither proposition is true.

According to CX 342-F, Dr. Kridl was appointed Director of the Chemical Industries Department on December 1, 1972. Complaint counsel point to CX 342-B to show that the cover page of the study "The U. S. Industrial Gas Industry" bore the date "November 1972." And CX 342-C, describing the authorship of the study, does not mention Dr. Kridl's name.

But BOC RX 257, the SRI Report Clearance Form for this study, bears Dr. Kridl's signature as "Program Director or Manager" and the date "12/19/72." And BOC RX 258, the letter transmitting the study to the client, is dated January 31, 1973, two months after Dr. Kridl had assumed direction of the group preparing the study.

We have followed the example of complaint counsel

and deleted the name of SRI's client for whom the study was prepared. But clearly all of these documents refer to the same study -- for they all bear reference to "Project No. ECC-1949." Dr. Kridl's name does not appear on the report as one of its authors, it seems reasonable to infer, because he was not an author -- he was, as his title indicates, the supervisor.

Complaint counsel apparently offer CX 342-A, a letter from SRI's counsel, Geoffrey Steele, Esq., to contradict Dr. Kridl's testimony that the study which BOC did for a foreign company related in part to the United States. But the error was not Dr. Kridl's but Mr. Steele's -- as he has acknowledged in BOC RX 259.

Since complaint counsel seek to put Dr. Kridl's credibility in issue, we suggest that the best possible demonstration of the reliability of his testimony is BOC RX 260A-F, a paper presented in May 1973 by William H. Perry, Planning Coordinator of Air Products. The data reported by Mr. Perry parallel almost exactly the data furnished in these hearings by Dr. Kridl, and the inferences the two gentlemen draw are in almost exact accord. We should perhaps say that we would have offered BOC RX 260A-F

during the hearings, but it came to our attention only after the hearings had ended.

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

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Dated: New York, N. Y.
July 23, 1974

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FEDERAL TRADE COMMISSION
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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

BRITISH OXYGEN COMPANY, LIMITED,
BOC FINANCIAL CORPORATION,
BOC HOLDINGS, LIMITED,
BRITISH OXYGEN INVESTMENTS, LIMITED,
AIRCO, INCORPORATED.

DOCKET NO. 8955

ORDER RECEIVING EXHIBITS IN EVIDENCE

By memorandum of July 9, 1974, complaint counsel have offered into evidence certain documents received from Stanford Research Institute. Although formal hearings have been completed, the record has remained open to permit complaint counsel to make an offer of such documents (Tr. 2793-2796). The documents offered by complaint counsel have been identified as CX 342 A-F.

Respondent BOC has responded to complaint counsel's offer by stating that it will interpose no objection to the documents provided that BOC RX 257, 258, 259 and 260 A-F are received in evidence simultaneously.

Complaint counsel's reply to BOC's response is to the effect that there is no objection to receipt of BOC RX 257, 258 and 259. However, complaint counsel strenuously object to the receipt of BOC RX 260 A-F. Complaint counsel's objection is to the effect that BOC RX 260 A-F is a speech by a Mr. Perry of Air Products and Chemicals, Inc., and that to receive the speech would deny complaint counsel the right of cross-examination to test the foundation for certain statements in the speech and to otherwise inquire into Mr. Perry's qualifications to speak about the industrial gas industry in the United States. Complaint counsel further point out that Mr. Perry's speech is totally unrelated to the Stanford Research Institute documents and the record herein has been closed except for the limited purpose of considering documents received from Stanford Research Institute.

Complaint counsel's objections to the receipt of BOC RX 260 A-F are sound and the exhibit will be rejected; all the other exhibits offered by complaint counsel and respondent BOC will be received in evidence. It is observed that the parties will be responsible for furnishing the Commission's Docket Section with copies of all exhibits hereby received in evidence. Accordingly,

IT IS ORDERED that CX 342 A-F be, and it hereby is, received in evidence.

IT IS FURTHER ORDERED that BOC RX 257, 258 and 259 be, and they hereby are, received in evidence.

IT IS FURTHER ORDERED that BOC RX 260 A-F be, and it hereby is, rejected.

Ernest G. Barnes

Ernest G. Barnes,
Administrative Law Judge.

August 1, 1974

FEDERAL TRADE COMMISSION
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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

BRITISH OXYGEN COMPANY, LIMITED,
BOC FINANCIAL CORPORATION,
BOC HOLDINGS, LIMITED,
BRITISH OXYGEN INVESTMENTS, LIMITED,
AIRCO, INCORPORATED.

DOCKET NO. 8955

ORDER RULING ON PROPOSED EXHIBITS

By memorandum filed July 30, 1974, respondent BOC has offered into evidence BOC RX 261 A-C, 262 A-I and 263 A-O. BOC RX 261 is an excerpt from the 1973 Annual Statistical Report of the American Iron and Steel Institute containing a chart of the consumption of oxygen by the iron and steel industry in 1973. BOC RX 262 is a preliminary United States Tariff Commission Report entitled "United States Production and Sales of Crude Products from Petroleum and Natural Gas (For Chemical Conversion) -- 1972." It bears a March 1974 publication date. BOC RX 263 is a preliminary United States Tariff Commission Report entitled "United States Production and Sales of Miscellaneous Chemicals -- 1972." It bears an April 1974 publication date.

Respondent BOC maintains that BOC RX 262 and 263 contain 1972 production and sales information for propane, butane, propylene, halogenated hydrocarbons and cyclopropane, and that information is needed to supplement the production and sales information for industrial gases contained in the 1972 Census of Manufacturers, which is a part of the record.

Complaint counsel object to the receipt of these three exhibits since the record has been closed as to exhibits of this nature.

BOC RX 261 is rejected. The record has been closed for the reception of evidence except for certain documents relating to Stanford Research Institute. Respondents have

offered into the record statistical information from the American Iron and Steel Institute for years prior to 1973. The exclusion of 1973 information will not be prejudicial to respondents in any way.

Even though the record for the reception of evidence has been closed, BOC RX 262 and 263 are proper subjects for official notice and will be received in the record on this basis. Respondent BOC will be responsible for furnishing the Commission's Docket Section with copies of these exhibits. Accordingly,

IT IS ORDERED that BOC RX 262 and 263 be, and they hereby are, received in the record on the basis of official notice.

IT IS FURTHER ORDERED that RX 261 be, and it hereby is, rejected.

Ernest G. Barnes,
Administrative Law Judge.

August 2, 1974